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CASE AND COMMENT

STATUTE—ABUSE OF PROCEDURE—INJUNCTION

IT is not unusual for statute to remedy points of weakness in judge-made law. That judge-made law can come to the assistance of statute is shown by *Attorney-General* v. *Smith* [1958] 3 W.L.R. 81.

Section 12 (1) of the Town and Country Planning Act, 1947, provides that "Subject . . . to the provisions of this Act . . . permission shall be required . . . in respect of any development of land." Where unauthorised development has taken place, the local planning authority may serve an enforcement notice and, if this is disregarded, a fine of £50 may be imposed and for further defiance a fine of £20 per day. The Act makes provision, however, for the grant of retrospective permission, and it is open to a person, who has undertaken unauthorised development, to apply for such permission even after the service of an enforcement notice. This has the effect of suspending the notice until the application has been finally determined. Since an appeal lies to the Minister against the decision of the local authority and his decision must be preceded by a local public inquiry, it is plain that a considerable period may elapse before the notice is again effective.

The defendant began in March, 1955, to use land at Egham as a site for five caravans. This was unauthorised development and the local authority served an enforcement notice, but this was suspended by an application for retrospective permission. The local authority refused and, on appeal, the Minister, on December 31, after the statutory inquiry, affirmed their decision. By then there were sixty caravans on the site and the local authority allowed some four months' grace before serving a fresh notice. Although it was plain that permission had been refused, not because of any objection to the particular site, but on the ground that the whole

district was a "Green Belt," the defendant made a fresh application with certain variations, thereby again suspending the notice. The application was refused and the notice became effective. Since the defendant did not comply with it he was fined £25 and later a summons was taken out claiming the daily penalty. In October, 1956, before the hearing, the caravans were moved to an adjacent site and a fine of only £2 was imposed. An application was then made in respect of the new site and, when this failed, the caravans were moved in March, 1957, to a third site. An application for this site, with an appeal to the Minister and an inquiry, carried the matter to July 26, 1957, by which time there were 156 caravans. The application was, of course, unsuccessful, as were those then made for other adjoining sites, which were disposed of on April 24, 1958.

In an action by the Attorney-General on the relation of the local authority for an injunction restraining the defendant from using any land in the district for caravan sites without prior permission, Lord Goddard C.J. held that the defendant knew after the first application was rejected that permission would not be forthcoming for any site in the area and was using the machinery of the Act for purposes of evasion and delay. Section 12 (1) made development without permission unlawful and, since the Act was designed for the public good, the defendant's conduct constituted a breach of a public right in respect of which the Attorney-General could move for an injunction. The existence of statutory penalties was immaterial.

These principles were established in *Attorney-General* v. *Ashbourne Recreation Ground Co.* [1903] 1 Ch. 101 and *Attorney-General* v. *Wimbledon House Estates Co., Ltd.* [1904] 2 Ch. 34 and were applied to the Town and Country Planning Act in *Attorney-General* v. *Bastow* [1957] 1 Q.B. 514. It is worth noticing, however, that in all these cases injunctions were sought in respect of actual infringements of the Act in question. In *Smith's* case the defendant was within his rights in moving from site to site and countering enforcement notices by applications for retrospective permission. It is submitted with respect that Lord Goddard's view of section 12 (1) fails to take sufficient account of the words "Subject to the provisions of this Act," which must refer *inter alia* to the provisions of which the defendant was availing himself. An injunction requiring the defendant to obtain prior permission seems to impose an obligation which is not found in the Act. The real basis of the decision appears to be that the defendant was not using the statutory machinery in good faith, but if this is to preclude its use a requirement of *bona fides* must be found in the Act.

There is scant authority for such an implication, particularly in an Act whose nature would normally attract a restrictive interpretation. While there is no need to quarrel with the decision on the merits, it may be said that if the defendant's conduct was undesirable, it was the Act that made it possible and the cure should be by amendment rather than by the extension of a legal principle. The grant of an injunction, even in a relator action, is in the discretion of the court and it is to be hoped that the precedent of *Smith's* case will be used with restraint.

H. DE WAAL.

HABEAS CORPUS—SUCCESSIVE APPLICATIONS

THE applicant in *Re Hastings (No. 2)* [1958] 3 W.L.R. 768 had been convicted on five counts of an indictment and sentenced to "four years' corrective training." The Court of Criminal Appeal quashed his conviction on the first count. He then applied to the Divisional Court (Lord Goddard C.J., Streatfeild and Slade JJ.) for a writ of habeas corpus on the grounds that the justification for his imprisonment had disappeared. The court rejected his application, holding that the sentence was to be construed as one of four years on each count, to run concurrently. Six months later the applicant made a fresh application to the Divisional Court (Lord Parker C.J., Hilbery and Diplock JJ.) on the same grounds. It was his view that he was entitled to the opinion of all the judges of the Queen's Bench Division upon his case, and it was for that reason that he applied to a differently constituted Divisional Court. He argued that he would have been entitled to the opinion of all the judges of the Common Law Courts before 1873 and that all the judges of the Queen's Bench Division had a similar duty to hear him. The Divisional Court has held that though, in effect, an applicant may have had the right to the opinion of all the judges before 1873, this was an incidental result of (1) the fact that application in term time was to the court sitting *in banc* and so would be heard by all the members of the court available at the time, and (2) the fact that when four courts had jurisdiction (the courts of Queen's Bench, Common Pleas, Exchequer and Chancery), an applicant did have the right to go from court to court, and it was not considered a bar to applying to one court that the application had already been refused by another. It was, however, to the "court" that he applied, not the judges sitting in it, and it was never true that an application could be made to the same court twice. "While the decision whether or not to issue the writ of

habeas corpus is not a judgment so that there is no *res judicata* it is not a writ of course . . . and the decision whether or not to issue it involves the exercise of a judicial discretion. The court must have an inherent jurisdiction to refuse, having once exercised its discretion, to hear the same matter argued again."

In 1873 the common law courts were absorbed in the High Court. Since 1880 there has been only one Common Law Division, the Queen's Bench Division, and its jurisdiction in these matters is exercised in accordance with R.S.C., Ord. 59 (1), by a judge or Divisional Court. The Divisional Court when acting in such a case is therefore the successor of the three common law courts. (It is also, it has since been held, the successor of the Court of Chancery: *Re Hastings* (*No. 3*) [1959] 2 W.L.R. 454.) Its decision is the equivalent of a decision by each of these courts in turn. Once it has been given, the court, even though differently constituted, will not consider again an application it has already rejected. Counsel, it seems, made no attempt to apply to the judges of the court individually, as in *Ex p. Le Gros* (1914) 30 T.L.R. 249 where counsel unsuccessfully attempted to apply to the Lord Chief Justice when sitting as a member of the Court of Appeal, and the Divisional Court has left open both the question of the extent of the jurisdiction of an individual judge to deal with an application, and also the question whether it is possible, after one judge has refused, to make a fresh application on the same grounds to another judge of the same Division. The Privy Council in *Eshugbayi Eleko* v. *Officer Administering Nigeria* [1928] A.C. 459 took the view that in vacation an applicant could go from judge to judge. They accepted also the argument that Parliament did not, in 1873, intend to reduce an applicant's power of applying. They recognised that the possibility of going from court to court had been reduced, if not removed, by the absorption of the common law courts in the High Court. They thought, though, that it would be a curious result if an application could be made to all the judges in turn in vacation, but only to one court of three judges in term. They therefore concluded that individual judges must have the right to issue the writ in term as well as vacation, and that an applicant must have the right to go from judge to judge, in term as in vacation. The Divisional Court has refused to express a concluded opinion on this point, but has brought forward reasons for doubting the correctness of the Privy Council's decision, at least on historical grounds.

The Divisional Court end their judgment with the plea that "there should be an appeal to the House of Lords in criminal matters where the writ of habeas corpus has been refused. This

case is just the case in which a ruling by the highest tribunal in the land is required."

G. P. Wilson.

LOCAL GOVERNMENT—MEETING OF COUNCIL—COUNCILLOR'S PECUNIARY INTEREST

Members of Parliament have recently approved the repeal of the several House of Commons (Disqualification) Acts which disqualified from membership persons who held or undertook contracts or commissions for, or on account of, the public service. The enforcement of this disqualification was at the suit of a common informer who could recover by action from a person so disqualified a penalty of £500 for every occasion on which he sat or voted in the House of Commons. In 1957, when Parliament by the House of Commons Disqualification Act amended and simplified the complex tangle of laws which disqualified the holders of certain offices under the Crown, opportunity was taken to remove entirely any disqualification by reason of a member having a pecuniary interest direct or indirect in a contract with any government department or branch of the public service. There was every reason for simplifying the existing statute law, and in particular for eliminating the common informer, but at first sight it was surprising to find that for the future a member of Parliament would be, according to the letter of the law, at liberty to speak and vote upon a matter in which he had so direct a pecuniary interest as a contract for the supply of goods to a government department. Nevertheless the view prevailed that the conventional rule which expects a member of the House of Commons to declare at the outset any interest pecuniary or otherwise in proceedings in Parliament in which he takes an active part is a sufficient safeguard against possible corruption. It was pointed out that there were no modern precedents which reflected to the discredit of members of Parliament in this regard and so it seemed safe to leave this delicate issue to the conscience of individual members.

In *Rands* v. *Oldroyd* [1958] 3 W.L.R. 583 the question in issue was the meaning of "pecuniary interest" of an elected member of a local authority. Until comparatively recently members of borough and county councils were debarred by statute from membership if they had directly or indirectly a share or interest in any contract with, or employment by, the council or a committee thereof. The share or interest of a partner similarly disqualified. But it was decided in the House of Lords in *Lapish* v. *Braithwaite*

[1926] A.C. 275 that a shareholder and managing director of a limited liability company who was paid by salary was not disqualified from membership of a local authority with which his company had entered into a contract. Partly in consequence of this decision the Local Government Act, 1933, substituted for this disqualification from membership by reason of share or interest, an obligation of prior disclosure and a requirement to abstain from discussion or voting on any question with respect to a contract, proposed contract or other matter in which the member has any pecuniary interest direct or indirect (s. 76). The interest of a shareholder has thus become a pecuniary interest.

The case under comment affords an extreme illustration of what may be a direct pecuniary interest in an "other matter" within the meaning of this section. The defendant was managing director of, and held a controlling interest in, a building company. As an elected member of the Wisbech borough council and vice-chairman of the housing and town planning committee of the council, he decided that his company would not in future tender for any building contracts for the council. Some months later a motion was proposed in council that when tenders for building were invited the borough engineer should submit a tender on behalf of his department for any contract that he felt might be within the scope of that department, and that where necessary the direct labour force should be increased in order to implement this policy. At a later meeting it was suggested that the policy should be changed by allowing the borough engineer to tender as hitherto, but not to enable him to increase the direct labour force for this purpose. The defendant spoke (and also voted) in favour of the amendment. He was prosecuted on behalf of the Director of Public Prosecutions on the grounds that he had a pecuniary interest in the matter in favour of which he spoke. Clearly the defendant's company was in a position to tender for building work for the council if he, as managing director, should reverse his earlier decision that the company would not tender for building contracts for the council. It was equally clear that if the borough engineer could not increase his direct labour force he could not tender for some of the contracts which might become available in the future. Could it be said that the expression "or other matter" was to be construed *ejusdem generis* with "contract or proposed contract," or construed as meaning a specific transaction or matter which, like a contract or proposed contract, gave rise to rights and liabilities? The discussion in the council only related to a question of general policy and did not affect any existing rights or liabilities. The justices before whom the case first came took the view that in spite of the

defendant's earlier decision that his company would not tender in future he ought to have made a positive statement in open council to that effect. In the absence of such statement his company could have tendered at any time. No doubt was cast upon the defendant's sincerity in his decision that his company did not intend to tender while he held office in the council, and it was clear that he had acted throughout in an open and honourable manner. The justices felt bound to convict. On a case stated, the Divisional Court upheld the conviction but approved the decision of the justices to grant an absolute discharge.

No doubt members of local authorities may be exposed to temptation to seek pecuniary gain from their membership more easily than in modern conditions may be members of Parliament. Nevertheless the rigid wording of the Local Government Act, 1933, s. 76, which, in the opinion of Lord Parker C.J., makes it impossible to cut down the words " or other matter " when used in conjunction with " any contract or proposed contract " to something which is definable and which is a limitation on what appears to be general words, could stultify business at council meetings, especially if a large proportion of the members present are engaged locally in trade and commerce. The Lord Chief Justice found that the company in which the defendant was the principal shareholder on the particular facts did have a direct pecuniary interest even though no specific contract or proposed contract was under consideration, but merely the framing of standing orders with respect to future contracts.

It is for consideration whether since members of Parliament can now dispense with any legal restriction, the restraint upon members of elected councils should not be eased by the amendment of section 76 so as to limit the requirement of disclosure to occasions when a specific contract or matter which gives the member some legal right arising out of it may be in issue. No one questions the need to eliminate corruption whether in central or local government, but the unpaid voluntary service which those who take part in local government render should surely not be hampered by excessively rigid conditions which in the case in point involved a respectable citizen being prosecuted to conviction in the magistrates' court sitting in his home town. It is true that the Ministry of Housing and Local Government has a limited power to dispense with the disqualification if a sufficient number of councillors are disqualified so as to impede the business of the council. This power in itself is objectionable in these days of party political divisions in local government. It could more appropriately be entrusted to, say, a county court judge than to a Minister of the Crown. But

dispensation under the existing power could not have saved the Wisbech councillor.

E. C. S. WADE.

HIGHWAY—COUNTY COUNCIL'S FUNCTIONS—NEGLIGENCE AND NON-FEASANCE

A RECENT decision of the Court of Appeal, *Baxter* v. *Stockton-on-Tees Corporation* [1958] 3 W.L.R. 275, throws a strong light on one of the shadier corners of the common law. The plaintiff's husband had been killed after colliding on his motor-cycle with an approach island to a road roundabout for which the defendants were responsible as the highway authority, and which, said the plaintiff, was dangerously sited and inadequately lighted. £4,500 were awarded in damages at Durham Assizes, but an appeal by the defendants was allowed.

The judgment of the court, delivered by Jenkins L.J., is a careful review of the facts and the law. On the facts the court was inclined to think the trial judge "took a somewhat exaggerated view of the danger." They doubted whether the present condition of the island amounted to an unreasonable danger, but they grounded their decision on a point of law. There is a well-established rule of common law that no action for damages lies against those responsible for the maintenance of a highway at the instance of one who is injured by an omission to repair.

The court did concede that there was authority for the proposition that "a highway authority constructing a road for the public use under statutory powers owes a duty to the public to take reasonable care to construct the road properly, so that it will be reasonably safe for the purpose for which it is intended to be used" (p. 286). But unfortunately for the plaintiff the road had changed hands since being built by the Durham County Council, the defendants having taken it over as highway authority under section 32 of the Local Government Act, 1929. This had happened in 1941 and the defendants had made no alterations to the road since. The court refused to hold that the construction-duty had devolved on the defendants as a matter of law; they were not even satisfied as a matter of fact that the original construction had been negligent.

A further argument had been advanced for the plaintiff based on a well-established principle that, if a highway authority places an obstruction on the highway, they must protect the public by adequate precautions, *e.g.*, lighting, and this duty, it was said, devolved on the defendants. Counsel for the defendants had argued that the island was not an obstruction but rather an integral part

of the highway. The court preferred to distinguish again between misfeasance and non-feasance, and held that whatever might have been the liability of the county council the defendants themselves had done nothing. The general principle of immunity for mere non-feasance applied. Here, too, the court refused to construe section 32 of the 1929 Act which transferred "the functions of maintenance" as importing a continuing obligation devolving on the defendants.

This immunity is explicable in terms of history, but very difficult to justify in modern conditions of fast traffic. The judges have created many exceptions to mitigate the operation of this unsatisfactory rule, but have not been able to distinguish it out of existence. How unsatisfactory it is may be seen by contrasting the facts of this case with the statement in Brooke's sixteenth-century *Abridgment* (Action on the Case, pl. 93) where he says that if a highway be out of repair by which my horse is mired, no action lies because the responsibility is a public one and redress is by presentment. The new Highways Bill (published while this note was being written) does indeed do away with indictments for neglect to maintain a highway and replaces this process with a procedure before Justices of the Peace to compel proper upkeep of roads. But nowhere does it give an action to an individual who has suffered injury through omission to repair. No comfort is to be obtained from the section which provides that the highway authority "shall be under a duty to maintain the highway." The decision of the House of Lords in *Cowley* v. *Newmarket Local Board* [1892] A.C. 345 is against an implication of an action for breach of the statutory duty, and the present Bill is primarily a consolidating measure. If the law is not to be amended this time, the subject ought at least to be referred to the Law Reform Committee. As the law stands, judges are bound to differentiate between the highway authority acting as the highway authority and acting in another capacity, *e.g.*, as traffic authority, sanitary authority, civil defence authority, etc., to distinguish between installing a cover in the road which projects and a cover which projects only after the road around has worn away (*Thompson* v. *Mayor of Brighton* [1894] 1 Q.B. 332), and to deny claims which on their merits certainly call for redress. It is not creditable that such attenuated distinctions should survive when there is an opportunity to repeal the principle of law on which they rest.

D. E. C. Yale.

CONFLICT OF LAWS—DIVORCE—DECREE RECOGNISED BY COURTS OF WIFE'S ORDINARY RESIDENCE—WHETHER RECOGNISED BY COURTS OF HUSBAND'S DOMICILE IN ENGLAND

When the Law Reform (Miscellaneous Provisions) Act, 1949, s. 1 (1) (*a*) (now the Matrimonial Causes Act, 1950, s. 18 (1) (*b*)) had thrown open the divorce jurisdiction of English courts to women ordinarily resident in England for three years and after the Court of Appeal in *Travers* v. *Holley* [1953] P. 246 had recognised the jurisdiction of foreign courts in similar circumstances, two questions remained.

The first is whether the new sphere of jurisdiction in divorce accorded to foreign courts can be further enlarged as a result of the operation of the rule in *Armitage* v. *Att.-Gen.* [1906] P. 135, according to which a divorce decree made anywhere will be recognised in England, if it is recognised by the courts of the country which has jurisdiction according to the English principles of the conflict of laws (which was, in 1906, exclusively the country of the domicile). The second is whether the rule in *Travers* v. *Holley* applies only if the parties are domiciled in England.

The first question has now been answered negatively in *Mountbatten* v. *Mountbatten* [1959] 2 W.L.R. 128, while the solution of the second has come nearer, if the implications of an *obiter dictum* in the same case can be taken as a pointer. Incidentally, the decision is noteworthy because Davies J. attempted to reformulate the rule in *Armitage* v. *Att.-Gen.* and because the Queen's Proctor gave advance notice of his intention to challenge the rule in *Travers* v. *Holley* when the occasion arises.

The facts themselves, shorn of their Latin-American trappings, are simple. The spouses were domiciled in England, but the wife had been ordinarily resident in New York for at least three years. She travelled to Mexico, registered as a resident in the District of Bravos, State of Chihuahua, some time in April or May, 1954, and petitioned for a divorce on May 21, 1954. The husband appeared the same day by his attorney, whom he had appointed on April 14, 1954, and a decree of divorce was pronounced on May 22, 1954. It was proved that the divorce would be recognised by the courts of New York. The husband, in asking for a declaration that the Mexican decree had validly dissolved the marriage, argued primarily that, since in petitions for a divorce brought by a wife jurisdiction is no longer restricted to the courts of the husband's domicile but is now extended to any country where the wife is ordinarily resident for the requisite time, the principle in *Armitage* v. *Att.-Gen.*, which was established when the courts of the domicile had exclusive

jurisdiction, must now be applied if a decree of divorce, wherever obtained upon the petition of the wife, is recognised by the courts of the country where she is ordinarily resident. Davies J. rejected this argument.

The rule in *Armitage* v. *Att.-Gen.* has been scrutinised critically by Dr. Morris in (1946) 24 Can. Bar Rev. 73, but the policy which it expresses has not been questioned. This is justified if the spouses are domiciled (in the English sense) in a country which forms part of a federal State under the law of which a decree of divorce made by the courts of another country, forming part of the same federal State, must be recognised, be it because one of the spouses is domiciled (in the foreign sense) in the latter country, or because the parties have submitted to the latter's jurisdiction by appearing in person or through a duly authorised agent; such is the modern practice in the United States. *Armitage* v. *Att.-Gen.* gives it effect in England today, though, as Dr. Morris has argued, when this case was decided, it may have anticipated in the particular circumstances of the case the modern American development of recognition by some forty years. If these considerations are correct, the attempt by Davies J. to reformulate the rule is too restrictive when he said (at p. 149) " . . . our courts will recognise a decree of divorce which is recognised as valid by the court of the husband's domicile as having been pronounced by a court in the *jurisdiction of which the wife had obtained a separate domicile.*" Not the wife's separate domicile (in the New York sense), but the fact that the New York courts recognise the decree given in a sister State, for whatever reasons, is decisive.

Going even further, it must be conceded that the English practice, which, generally speaking, attributes exclusive jurisdiction to the courts of the domicile, is not universally acknowledged abroad, where residence, presence and submission serve as the bases of jurisdiction. If fictitious universality is to be accorded to the jurisdiction of the courts of the domicile, foreign divorces, pronounced by courts which accept other bases of jurisdiction and recognised by the courts of the foreign domicile of the spouses, must be disregarded altogether. Such an imposition of English jurisdictional ideas is unwarranted, the more so since English courts are not called upon to enforce the foreign decrees but to recognise them in a variety of circumstances, some of which are unconnected with English life. Here again, the rule in *Armitage* v. *Att.-Gen.* provides a useful corrective. The courts of New York recognise divorces pronounced outside the United States (*e.g.*, in Mexico) if both parties were physically present, if one party was physically present and the other was represented by a duly authorised

attorney, or, finally, if one party was present and bona fide domiciled in the foreign country, even if the other party has not appeared and not been served personally within the foreign jurisdiction. See (1957) 21 Albany L.R. 64; Howe in [1940] 40 Col.L.R. 373. English courts will thus recognise Mexican divorces of the Mountbatten type, if the spouses are domiciled in New York, subject possibly to one proviso. According to New York law, the absent party must be represented by a duly authorised agent: *MacPherson* v. *MacPherson*, 149 N.Y.S. 2d 525 (1956); *Molnar* v. *Molnar*, 131 N.Y.S. 2d 120, 284 App.Div. 948, 135 N.Y.S. 2d 623 (1954). The strictures of Davies J. (at p. 132) upon the power of attorney in the form required for the Mexican proceedings suggest that such a power may well be invalid, if it should be governed by English law.

The question remains whether the rule in *Armitage* v. *Att.-Gen.* applies when the foreign divorce is recognised by the courts of the country which, according to English Private International Law, can exercise jurisdiction in divorce because the wife has been ordinarily resident for three years: *Travers* v. *Holley*. If the spouses are domiciled abroad, the answer seems to be clearly "no." In the first place, the rule in *Travers* v. *Holley* itself has not, so far, been applied by English courts, except where the spouses were domiciled in England. In the second place, an *obiter dictum* by Davies J. (at pp. 154–155) denying that a combination of the rule in *Travers* v. *Holley* with that in *Armitage* v. *Att.-Gen.* can lead to the recognition of a foreign divorce in England, if the spouses are domiciled abroad and if the courts of the domicile themselves would refuse to recognise the decree, suggests that in the simpler situation where the foreign decree was pronounced in the exercise of jurisdiction envisaged in *Travers* v. *Holley* it cannot be recognised either, unless it is recognised by the courts of the foreign domicile. Any other answer must lead to the intolerable consequence that two foreign jurisdictions have an equal claim to recognition in England, even if neither recognises the other. In short, the rule in *Travers* v. *Holley* itself cannot apply if the spouses are domiciled abroad, and the problem must remain restricted to situations where the spouses are domiciled in England (*contra*, Dicey, *Conflict of Laws*, 7th ed., pp. 321 *et seq*).

When Dean Griswold in (1951) 55 Harv.L.R. 193 pleaded for the adoption of a broader jurisdictional principle than that based on domicile which favours the husband, he could not foresee that his plea would lead to a development which is weighted entirely in favour of the wife. As originally conceived, section 18 (1) (*b*) of the Matrimonial Causes Act, 1950, is a unilateral conflict rule which

extends the jurisdiction of English courts, but neither defines nor extends the English rules on foreign jurisdiction. Such unilateral rules are unusual in English Private International Law, except for the provisions of R.S.C., Ord. 11, r. 1, and for choice of law clauses in statutes (see Dr. Morris in (1946) 62 L.Q.R. 170). Continental practice shows that such rules tend to become bilateral through analogous application. The English technique of interpreting statutes makes this development difficult, but the courts have promoted it nevertheless by relying upon an alleged principle of reciprocity. The use of this term is misleading, since the foreign jurisdiction, exercised in circumstances when in England section 18 (1) (*b*) of the Matrimonial Causes Act would apply, is not recognised on the understanding that the foreign courts will recognise English decrees on the same terms (*cf.* Foreign Judgments (Reciprocal Enforcement) Act, 1933, s. 1; *Re Dulles Settlement* (No. 2) [1951] Ch. 842, 851). It signifies that English courts, of their own motion, and moved by a spirit of justice, are willing to attribute to foreign courts the same extent of jurisdiction as they claim themselves. This extension of " indirect jurisdiction " (Nussbaum, *Private International Law*, p. 239) may be welcome, as far as it goes, even if English courts have little opportunity of controlling the choice of law; but by linking it to the sex of the petitioner and by excluding decrees based on the husband's cross-petition (*Levett* v. *Levett* [1957] P. 156) it invites a novel scrutiny of foreign decrees. So long as English courts cannot admit that married women can have a domicile of their own, the existence abroad of a second jurisdiction in divorce, acting on an equal footing with that of the courts of the English domicile, is probably excluded. It seems to follow, however, that in these circumstances, the rule in *Armitage* v. *Att.-Gen.* cannot supplement this jurisdiction either, as the following considerations will show. Since the rule requires that any decree of divorce which is recognised by the courts of the country which has jurisdiction according to English notions must be recognised in England, a decree obtained by the husband in the circumstances of the *Mountbatten* case would have to be recognised as well. This would mean that a husband domiciled in England may command a very wide choice of jurisdiction, provided that his wife is ordinarily resident abroad in a country which is liberal in recognising foreign divorces. Clearly Davies J. was right in rejecting a combination of the rules in *Travers* v. *Holley* and in *Armitage* v. *Att.-Gen.* If the practical reasons supporting his decision are to be formulated in legal terms, the conclusion is this: The rule in *Armitage* v. *Att.-Gen.* supplements the jurisdiction of the courts of the foreign domicile, which is a general jurisdiction according

to English notions. It cannot serve to enlarge a special and exceptional jurisdiction, such as that established in *Travers* v. *Holley*.

K. Lipstein.

RECEIVING GOODS UNLAWFULLY OBTAINED—FELONY OR MISDEMEANOUR

In *D. P. P.* v. *Nieser* [1958] 3 W.L.R. 757 the prosecution appealed against the acquittal of the accused upon two informations: first that he had received a refrigerator from Mrs. H, knowing that she had obtained it by false pretences, contrary to section 33 of the Larceny Act, 1916; and secondly that he had received a television set from the same person, knowing that it had been obtained on credit under false pretences or by means of fraud, contrary to the same section.

Section 33 (1) reads as follows:

> "Every person who receives any property knowing the same to have been stolen or obtained in any way whatsoever under circumstances which amount to felony or misdemeanour, shall be guilty of an offence of the like degree (whether felony or misdemeanour) . . ."

The section is a consolidation of sections 91 and 95 of the Larceny Act, 1861. At common law the offence of receiving was a misdemeanour, and was limited to property that had been stolen. Section 91 made it a felony, and extended it to all cases where the property had been obtained by felonious means. Section 95 created an entirely new misdemeanour, dealing with the receiving of property obtained under circumstances amounting to misdemeanour. In each section, the mental element of the offence is stated to be knowledge, in section 91 that the property has been obtained by felony, in section 95 that it has been obtained by misdemeanour. The consolidating section, section 33, exhibits the same essential features.

The first question that arose was whether Nieser was guilty of any offence under the second information, assuming it to be proved that he received the television set knowing it to have been obtained by Mrs. H on credit under false pretences or by means of fraud. The defence plea, based on *R.* v. *Schweller* (1924), reported in 18 Cr.App.R. 52 and adopted as correct in Archbold, was that this second information, in the words of the report of the 1924 case, "disclosed no offence known to the law." It now appears, not from the report, therefore presumably from the record of the case,

that this 1924 decision of the Court of Criminal Appeal was based upon the idea that section 33 of the 1916 Act (like its precursor, section 95 of the 1861 Act) was confined to receiving property obtained by misdemeanours under the Act of 1916. The misdemeanour of obtaining credit by fraud was created by the Debtors Act, 1869, and was therefore not within section 95. In *R.* v. *New* (1957) 41 Cr.App.R. 207, the Common Sergeant, Sir Edward Hawke, did not follow the *Schweller* case, explaining it as a case where the indictment was bad on the face of it, and preferring to accept the contrary decisions of the Court of Criminal Appeal in *R.* v. *Kutas* (1923) 17 Cr.App.R. 179, and *R.* v. *Klein* (1932) 23 Cr.App.R. 173. With the authorities in this state, counsel for Nieser abandoned this plea before the Divisional Court, and indeed it had no substance, as the word "whatsoever" in section 33 is in striking contrast with the restricted description of the word "misdemeanour" in section 95—"made a misdemeanour by this Act."

Although the right view has undoubtedly prevailed, the process by which this has come about is rather disquieting. There is no indication in the report of *Schweller* of the basis of the decision, nor any hint that the indictment was bad on the face of it. There is nothing in the report of *Klein* to show that any point of law was involved: it is reported only on the question of refusal of bail. By delving among the records of these two cases, the learned Common Sergeant has succeeded in putting the criminal law in order, but all is not well when according to the reports and a book of authority such as Archbold there is no offence committed, and only research among material not readily accessible discloses that the published view is erroneous. It seems that in the 1920s and 30s, at any rate, there was something lacking in the standard of reporting of the decisions of the Court of Criminal Appeal.

One might have felt a little sympathy for Nieser had his conviction on the second information been upheld in these circumstances, because his alleged offence was in 1956, at a time before the report of *R.* v. *New*, when it seemed that his actions "disclosed no offence known to the law." But he actually escaped on both informations on another technicality, the Divisional Court holding that it was essential that it be proved that Nieser knew that the goods had been obtained by Mrs. H under circumstances amounting to some misdemeanour or other, and while the prosecution need not establish knowledge by the accused of the precise misdemeanour in question, if the accused could only be fixed with knowledge that the goods had been obtained dishonestly, this was insufficient, as he might erroneously believe that the goods were obtained by felony.

The court agreed that it was the height of absurdity to reach such a result, but considered that only Parliament could supply a remedy by redrafting section 33. It is a pity that the court did not examine the possibility of applying the " golden rule " of statutory interpretation, which is employed in these very circumstances, *viz.*, to modify the grammatical and ordinary sense of words which, strictly adhered to, lead to an absurd result. This rule, born in Ireland in 1828, received its well-known name from Jervis C.J. in 1854, and was restated by Lord Wensleydale in *Grey* v. *Pearson* (1857) 6 H.L.C. 61, 106. If it is thought that a penal statute must be strictly construed, despite the golden rule, the problem can be approached from the aspect of the *mens rea* of the crime. Counsel for the Crown conceded that if the goods had been obtained by a misdemeanour, it would be a defence to show that the receiver erroneously believed them to have been stolen. It is submitted that this concession should never have been made. It is true that section 33 requires a high degree of *mens rea* in the shape of knowledge, but a defence that the accused believed himself to be committing the more heinous crime of felony, carrying a maximum punishment of double that which can be imposed for the misdemeanour, sounds impudent and unconvincing. Dr. Glanville Williams has attacked the lesser crime doctrine (*Criminal Law*, pp. 156–161), and his cogent criticism could be invoked were an accused charged with felony under section 33 (1) when he believed the goods were obtained by false pretences, a misdemeanour, and actually they were obtained by larceny, a felony. But no theorist can quarrel with a decision that the fact that the accused believed himself to be committing not a lesser but a higher crime provides adequate *mens rea* to support a conviction for the lesser crime.

The Divisional Court has applied the literal rule of statutory interpretation in a field where our criminal law already lags far behind that of other modern systems. The Danish Criminal Code, for example, punishes grossly negligent receiving (s. 303), and provides for an enhanced punishment for a second offence. English law requires guilty knowledge, and if this latest decision stands it will give encouragement to the professional receiver, whose services are essential to the more active criminal classes. The court acknowledged that an absurd result had been reached. A few illustrations will show the extent of the absurdity. Even if this new decision is confined, as it is to be hoped it will be, to mistakes of fact, so that it will be no defence to the accused to prove that he made a mistake of law, and though in full possession of the facts wrongly assumed that the goods had been obtained say by larceny by a trick rather than by false pretences, very slight misinformation as to the

facts may lead the accused to believe that the obtaining was by felony whereas in fact it was by misdemeanour. The factual borderline between obtaining a rabbit by misdemeanour within section 17 of the Larceny Act, 1861, and larceny of a rabbit, is a narrow one. The same is often true of the misdemeanours of fraudulent conversion and false pretences on the one hand, and the felony of larceny on the other, and of the blackmail misdemeanour under section 31 of the Larceny Act, 1916, and the blackmail felonies under sections 29 and 30. Finally, if the accused believes the property was obtained by impersonating a soldier (felony), whereas it was obtained by impersonating a seaman (misdemeanour) and so charged, he must be acquitted of receiving. Clearly it is high time that the distinction between felonies and misdemeanours was abolished.

There are now brighter prospects that this branch of the law will receive some overdue reforms. The appointment of a strong Criminal Law Revision Committee, under the chairmanship of Lord Justice Sellers, has recently been announced, and among the first of their tasks is to be a review of the law relating to larceny and kindred offences. We look forward to the fruits of this important work.

R. N. Gooderson.

AIDING AND ABETTING—OFFENCE BY CORPORATION

In *National Coal Board* v. *Gamble* [1958] 3 W.L.R. 434 the Coal Board had a running contract to supply the Central Electricity Authority with coal, to be delivered into lorries sent by a carrier on behalf of the Authority. The Board was charged with aiding, abetting, counselling and procuring the carrier to use a lorry on the highway with a load exceeding with the weight of the lorry twenty tons, in contravention of regulations 68 and 104 of the Motor Vehicles (Construction and Use) Regulations, 1955. The lorry had been loaded with coal on the premises of the Board. H., the weighbridge operator employed by the Board, then weighed the lorry and load, and told M., the carrier's driver, that the load was nearly four tons overweight, asking him if he intended to take the full load away. M. said he would risk it, whereupon H. gave him a weight ticket, as required by section 21 of the Weights and Measures Act, 1889, without which he could not have left the Board's premises. The justices held that the handing over of the weight ticket constituted the offence of aiding and abetting, and convicted the Board. The Divisional Court, Slade J. dissenting, affirmed the conviction.

The Coal Board treated this as a test case, and invited the court to identify them with their servant H. Slade J. was doubtful of the court's jurisdiction to accept such an admission in a criminal case, but it is submitted that the court had little alternative. In the famous trilogy of cases in 1944, it was decided that a corporation may be liable for a crime requiring *mens rea*, on the principle that the acts and state of mind of certain of its employees are to be regarded as the acts and state of mind of the corporation itself. Two of these decisions were in the Divisional Court, and therefore binding on the Divisional Court in a subsequent case: *Huddersfield Police Authority* v. *Watson* [1947] K.B. 842. The only room for doubt relates to the type of servant whose acts will be attributed to his corporate master. In *D. P. P.* v. *Kent and Sussex Contractors, Ltd.* [1944] K.B. 146, 156, Macnaghten J. said that he must be a "responsible agent," and in *Moore* v. *I. Bresler, Ltd.* [1944] 2 All E.R. 515, 516, Lord Caldecote C.J. said that he must be an "important official." As the Board was prepared to concede that weighbridge operator H. fell within these categories, it would seem pointless for the court to insist upon evidence to establish what was admitted.

Another consequence of this admission was that the court did not have to examine the thorny problem whether the personal knowledge of the accused that an offence is being committed is a necessary ingredient of the offence of aiding and abetting (see Edwards, *Mens Rea in Statutory Offences*, p. 190, n. 4).

The case was fought on the question whether supplying essential material for the commission of a crime amounts to aiding and abetting. Slade J. thought that the supplier must also have the motive of assisting or encouraging the crime, while his learned colleagues relied upon the principle that a man is presumed to intend the natural consequences of his acts. The Board also contended that they had no right to refuse to complete the process of delivery. The majority were at pains to stress that to surrender a weapon to a criminal which he has the right to demand is not aiding and abetting, and distinguished *R.* v. *Lomas* (1913) 110 L.T. 239, where the Court of Criminal Appeal had held L. not guilty as an accessory before the fact for restoring on request a borrowed jemmy to its owner, knowing it was to be used for burglary, though not knowing of the particular burglary contemplated. They conceded that the Board would not be guilty had the discovery of the excessive weight come *after* the ownership of the coal had passed to the buyer. The court therefore considered the question when the property did so pass as a vital one, and concluded this to be when the weight ticket was supplied. This conclusion seems to be a correct application

to the facts of the Sale of Goods Act, 1893, s. 18, rule 5. Under this rule, where there is a contract for the sale of unascertained goods, the property passes when there is an unconditional appropriation to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, or by the seller delivering the goods to a carrier for transmission to the buyer. There was no evidence that the buyer had given express or implied authority to the carrier's driver M to make an appropriation, and there was no evidence of an unconditional appropriation by H for the seller until he issued the weight ticket. It was also the latter act that constituted delivery to the carrier, since without this ticket he could not remove his load from the Board's premises. The decision has been criticised (in 22 M.L.R. 91, 94) on the ground that even before the weight ticket was issued the Board was bound by contract to deliver to M. and would have been guilty of breach of contract had delivery not been concluded, and it has been argued that one who merely refrains from breaking a contract is within the principle of exemption supplied by the *Lomas* case for one who merely refrains from detaining a chattel belonging to a prospective criminal. On the facts of the instant case, however, the conclusion of the contract was either at the moment the weight ticket was issued, or at the earliest a few seconds before when M. replied in the affirmative to H.'s question whether he intended to take the full load. Even at the moment the contract was concluded, H. had full knowledge that if he agreed to sell the full load to the employer of M.'s master, M. would, if he accepted the offer, be bound to commit a criminal offence in transmitting it to the buyer. It is suggested that it is a sound legal principle to establish that one who sells a chattel in such circumstances that he has knowledge that the sale will inevitably involve the buyer or his agent in criminal conduct is guilty of aiding and abetting that conduct. The decision of the court is particularly welcome, as it is in the power of the Coal Board, through its weighbridge operator, to ensure that lorrydrivers do not commit a breach of the rules against overloading.

R. N. Gooderson.

Criminal Law—Meaning of "Reckless"

R. v. *Mackinnon* [1958] 3 W.L.R. 688 was not the first reported case on the meaning of the word "reckless" in section 12 (1) of the Prevention of Fraud (Investments) Act, 1939. The section reads:

"Any person who, by any statement, promise or forecast which

he knows to be misleading, false or deceptive, or by any dishonest concealment of material facts, or by the reckless making of any statement, promise or forecast which is misleading, false or deceptive, induces or attempts to induce another person—(a) to enter into . . . (i) any agreement for . . . acquiring . . . securities . . . shall be guilty of an offence. . . . "

It had been previously held by Donovan J. in *R.* v. *Bates and Russell* [1952] 2 All E.R. 842 that the word " reckless " meant " very careless," and his view had been approved by the Court of Criminal Appeal *obiter* in the same case *sub nom. R.* v. *Russell* [1953] 1 W.L.R. 77. In the 1958 case Salmon J. has differed from this view, holding that an accused, who honestly believes in the truth of what he has stated, cannot be guilty of an offence under this section, which carries a maximum sentence of seven years' imprisonment.

It is submitted, with respect, that the latest opinion, that of Salmon J., is the better one. Dr. Glanville Williams has already subjected the decision of Donovan J. to searching criticism: *Criminal Law*, pp. 121–122. Here it is desired merely to remark that the construction adopted by Salmon J. is supported by every known rule of statutory interpretation. Ever since the House of Lords' decision in *Derry* v. *Peek* (1889) 14 App.Cas. 337 the word " reckless " has borne a technical meaning, denoting a state of mind where the consequences are foreseen though not desired, as distinct from a state of mind where the consequences would have been foreseen by a reasonable man, though not by him whose conduct is in question, a mental state usually described as " inadvertent." Since 1889 there has been no tortious liability in deceit for anything less than recklessness in the sense just stated, a reckless statement in this context meaning one made by a person who is careless whether it be true or false. A similar test was adopted by the Divisional Court in *Williams Bros.* v. *Cloote* (1944) 60 T.L.R. 270 in construing the Rationing (General Provisions) Order, 1942, Art. 30 (1). Thus if the literal rule of statutory interpretation were applied to the term " reckless " it should be construed in this well-established technical sense. If, on the other hand, the mischief rule were applied, the intention of the legislature, as indicated by the short title, the long title, the cross heading and the marginal note to the section, was to punish fraud, and since 1889 there cannot be a careless fraud, unless Parliament clearly enacts otherwise, as in section 44 of the Companies Act, 1948. Donovan J. conceded that in case of ambiguity it is proper to look at the long title and the cross heading to ascertain the intention of Parliament, though he very properly rejected the marginal note as a guide to construction.

Two considerations, however, prompted his Lordship to the conclusion that the word " reckless " in section 12 (1) bore a wider meaning than in *Derry* v. *Peek*. The first was that the language of a section may go beyond the mischief aimed at by Parliament, or, in other words, the patch may be larger than the hole. It is perhaps not without significance that the dictum usually cited to support this contention is that of Scrutton L.J. in the Court of Appeal in *Banbury* v. *Bank of Montreal* [1917] 1 K.B. 409, 432, where the court construed the words " any misrepresentation " in section 6 of Lord Tenterden's Act, 1828, as not limited to fraudulent misrepresentation. Despite the generality of the words, however, the House of Lords reversed the Court of Appeal, and confined the words to fraudulent representation: [1918] A.C. 626, 640, 691, 707. In section 12 (1), by contrast, Donovan J. was not asked to limit words absolutely general in scope by reference to the intention of Parliament, but merely to construe a word in its technical legal sense, even though etymologically it might bear a wider meaning.

Donovan J. advanced another reason for his conclusion. As has been seen, the section punishes *inter alia* reckless forecasts, and in his Lordship's opinion, were honest belief to be a defence, proof would be difficult. This is no reason for giving the criminal law of misrepresentation a wider sphere than the civil law. In civil law, there is no remedy for innocent misrepresentation of opinion, not even that of rescission of the contract, because the test of misrepresentation of opinion is subjective, and therefore if the defendant believes in his opinion there is no remedy against him even though he has been careless; but if he indicates a higher degree of belief than he possesses, he will of course be guilty of fraud (see Salmond & Williams, *Contracts*, 2nd ed., 247). If this, the difficulty in some cases of proving the offence, is the main argument for construing the word " reckless " in an unusual sense, it is submitted that to overcome such a difficulty by disregarding the ordinary meaning of the word is tantamount to legislation.

R. N. Gooderson.

NEGLIGENCE—BANKER'S ADVICE ON INVESTMENT—LIABILITY TO CUSTOMER

Woods v. *Martins Bank, Ltd.* [1958] 1 W.L.R. 1018, a decision of Salmon J. at Leeds Assizes, establishes that a bank may be under a duty of care when giving advice to a customer on investments and liable in negligence for a breach of that duty. At the beginning of May, 1950, the plaintiff, who had no business experience, asked

J, the manager of a branch of the defendants' bank, to be his financial adviser, and J replied that the bank would only be too pleased to take care of his financial affairs. On May 9, 1950, J advised the plaintiff to invest £5,000 in preference shares of B. R., Ltd., a private company, who were customers of the bank and for whom J acted as financial adviser. The plaintiff in a letter dictated by J authorised the proceeds of certain of his investments to be paid to the bank and out of this sum the bank paid for the preference shares and the balance was placed to the plaintiff's credit in a suspense account. On June 1, 1950, the bank opened a current account for the plaintiff. Subsequently on J's advice the plaintiff invested a further £6,800 in shares in B. R., Ltd., and made a loan of £3,000 to the company in the form of an unregistered bill of sale. The plaintiff lost his £14,800 investments and sued both the bank and J. His claim in fraud failed as it was found that J honestly believed in the advice he gave, but it succeeded against both in negligence.

In the course of his judgment Salmon J. stated that the scope of a banker's business could not be laid down as a matter of law; it was a question of fact. The bank's advertisement clearly showed that it was within the scope of the bank's business to give advice on investments and that the plaintiff was entitled to look to J for advice. This finding distinguished the case from *Banbury* v. *Bank of Montreal* [1918] A.C. 626. The bank therefore owed a duty to the plaintiff to advise him with reasonable care and skill. From May 9, 1950, when the bank accepted the plaintiff's instructions, the relationship of banker and customer existed between them. Even if the plaintiff did not become a customer of the bank until June 1, the defendants were still under a duty that the financial advice given to the plaintiff should have been given with ordinary skill and care. There were no grounds on which J could reasonably have advised these investments, and further, unknown to the plaintiff, B. R., Ltd. had a considerable overdraft with the bank, which at all material times the head office of the bank were pressing J to get reduced. In the circumstances J ought never to have advised the plaintiff without making a full disclosure to him of the conflicting interests between the plaintiff and the bank and B. R., Ltd. As none of the advice was reasonably careful or skilful, and but for it the plaintiff would never have made any of the investments, J and the bank were liable in negligence.

A *careless* misstatement of fact given gratuitously which causes pecuniary loss is not actionable as a tort—it is not fraud: *Derry* v. *Peek* (1889) 14 App.Cas. 337; nor is it negligence, for there is no

duty of care in making such a statement: *Candler* v. *Crane, Christmas & Co.* [1951] 2 K.B. 164. But where a contractual relationship exists, the careless giving of advice by a banker to his customer may make him liable to the customer in the same way as a solicitor may be liable for wrong advice carelessly given to a client. This is sometimes referred to as " professional negligence." However, it seems that there was no contractual relationship between the plaintiff and J, and there is no clear indication in the case as reported why the bank manager was liable in negligence for a breach of duty whereas the accountants in *Candler's* case were held not liable. *Nocton* v. *Ashburton* [1914] A.C. 932 (a solicitor and client case) established that the rule in *Derry* v. *Peek* is inapplicable when there is a fiduciary relationship between the parties, and this principle is referred to in *Candler* v. *Crane, Christmas & Co.* Although *Candler's* case is not cited in the judgment, Salmon J. clearly had this principle in mind, for he states that J ought never to have advised the plaintiff without making a full disclosure of the conflicting interests between the plaintiff, the bank and B. R., Ltd. The duty arose from the fiduciary relationship of the parties and the breach of duty made J. liable in negligence. The categories of fiduciary relationships are not too clearly defined, but it is to be hoped that they are not closed. In any event it is still open to the House of Lords to hold that a duty of care exists within the limits suggested by Denning L.J. (as he then was) in *Candler* v. *Crane, Christmas & Co.*, when a careless statement is made by a professional man to a person whom he knows will act on it, or if he intends him to act on it.

The case is now reported in [1959] 1 Q.B. 55, and at page 72 there appears a vital sentence not to be found in the *Weekly Law Reports*: " In my judgment, a fiduciary relationship existed between the plaintiff and the defendants."

T. Ellis Lewis.

NEGLIGENCE—RESCUE—NEGLIGENCE OF PERSON IN PERIL

The principal interest of *Baker* v. *T. E. Hopkins & Son, Ltd.* [1958] 1 W.L.R. 993 lies in an important, and welcome, *obiter dictum* of Barry J., though the actual decision itself provides a useful example of a " rescue " case.

The defendants had been employed to clean out a well some fifty feet deep, and, in preparation for their work, had to empty the well of about twelve feet of water. For this purpose a petrol driven pump was installed on a platform twenty-nine feet below the

surface, set in motion and left to itself. A Mr. Hopkins, the defendants' managing director, warned the two workmen concerned of the danger of carbon monoxide fumes which would be produced by the pump, and told them not to go down the well next day until he arrived. Nevertheless the two men descended the well, were overcome by the fumes and died as a result. It was held, in unreported proceedings, that Mr. Hopkins' warning had been insufficiently emphatic and that he had, therefore, been guilty of negligence to the workmen. It followed that the defendants were liable for their deaths.

After the men had descended the well, and because it was suspected that something was wrong, Dr. Baker, the plaintiff's husband, was summoned to the scene and told the position. Although aware of the danger, he considered it his duty as a doctor to try to help the two men, and he therefore descended the well himself. Before doing so, however, he took the precaution of tying a rope to himself by which he could be pulled from the well should anything go wrong. By mischance, when it became necessary to pull Dr. Baker from the well, the rope became caught in some obstruction and could not be freed. As a result Dr. Baker was overcome by the fumes and subsequently died.

Barry J. had little difficulty in holding the defendants responsible for Dr. Baker's death on the orthodox principles of the "rescue" cases, as laid down in *Haynes* v. *Harwood* [1935] 1 K.B. 146. The defendants had been negligent towards the workmen. Having thereby put them in a position of danger from which Dr. Baker had attempted to rescue them, they were liable to his widow. Though it was argued that in the present case, unlike *Haynes* v. *Harwood*, the negligence to the workmen arose out of the duty owed by a master to his servant and that that duty is personal to the servant so as to leave no room for a "rescuer," Barry J. held that this made no difference. A "rescuer" is protected whatever the relationship which gives rise to the original duty of care.

The case for the plaintiff was also put on the alternative ground that the workmen were themselves guilty of negligence towards Dr. Baker in the course of their employment. They disobeyed orders not to go down the well and so put themselves into a position from which they should have foreseen that someone would try to rescue them. Barry J. had no doubt that the men had been acting in the course of their employment, but he found the question "whether a right of action arises at the suit of the 'rescuer' when the negligent act is committed by the person whom he attempts to rescue" more difficult. With some hesitation, and notwithstanding a Canadian decision (*Dupuis* v. *New Regina Trading Co.*,

Ltd. [1943] 4 D.L.R. 275) to which his attention had been directed, Barry J. expressed the view that: "Although no one owes a duty to anyone else to preserve his own safety, yet if, by his own carelessness a man puts himself into a position of peril of a kind that invites rescue, he would in law be liable for any injury caused to someone whom he ought to have foreseen would attempt to come to his aid."

There seem to be two explanations, in terms of duty, of the rescue cases. The first is that the defendant owes, and breaks, a duty of care to the person placed in peril, and therefore is guilty of "derivative" negligence to the rescuer. This was the view taken by MacDonald J.A. in *Dupuis'* case where, as in the present case, the defendant was the employer of a person put in peril by his own negligence. Since the employer in that case had not been guilty of any negligence to his servant, he could not be guilty of "derivative" negligence to the servant's rescuer.

The other explanation makes no use of the notion of "derivative" negligence but holds, in short, that the defendant should have foreseen that his negligent act might cause damage to a "rescuer." On this view, which was evidently preferred by Barry J., there is no reason why the person who carelessly places himself in a position of danger should not be held to owe a duty to his rescuer. Even though he owed no duty to himself (*Nance* v. *British Columbia Electric Ry.* [1951] A.C. 601) he can foresee that someone may suffer damage in attempting to rescue him. On the ordinary principles, therefore, he is guilty of negligence to that person. With respect to MacDonald J.A., the view taken by Barry J. is much to be preferred, and it is hoped that his *obiter dictum* in the present case will be accepted as correctly expressing the English law on the subject.

J. A. Jolowicz.

CONTRACT—SHIPPING—CUSTOMARY ROUTE—FRUSTRATION

Carapanayoti & Co., Ltd. v. *E. T. Green, Ltd.* [1958] 3 W.L.R. 390 is one of the cases arising out of the blocking of the Suez Canal on November 2, 1956, the Canal not being reopened until April 29, 1957. The contract was made on September 6, 1956, and was for the sale of 100 tons of cotton seed cake by Messrs. Carapanayoti's of London to Messrs. Green's of Belfast, the cake to be shipped in October/November, 1956, at seller's option, from Port Sudan to Belfast, c.i.f. In October and November, 1956, no ships left Port Sudan via the Canal, but in November fourteen ships cleared Port

Sudan with cargo for the United Kingdom or Europe via the Cape of Good Hope. The voyage from Port Sudan to Belfast via the Canal is 4,068 miles, but via the Cape is 10,793 miles. It was obvious early in October that the Canal would certainly not be opened before the end of November, and Messrs. Carapanayoti could not have purchased the contract goods afloat after the closure of the Canal on November 2. They made no attempt to ship them. Messrs. Green's claimed damages for breach of contract. The case was referred to an arbitrator, who found for Messrs. Green; his decision was confirmed by the Board of Appeal of the London Cattle Food Association, and came before McNair J. on a case stated.

The first task to be tackled was the construction of the contractual obligation. The contract was for the shipment of goods from Port Sudan to Belfast: no route was specified. Was it the seller's duty to ship the goods via Suez as was usual and customary at the time the contract was made? McNair J. held that that was not the case. In his opinion when a contract expressly or by necessary implication provides that performance is to be carried out in a customary manner, the performance must be carried out in a manner which is customary at the time when the performance is called for, and this is particularly so in cases where one is concerned with mercantile matters in which custom and usage are subject to rapid change. This view has since been supported by Diplock J. in *Tsakiroglou & Co., Ltd.* v. *Noblee Thorl* [1959] 2 W.L.R. 179. Carapanayoti's obligation was to deliver the goods by the route which was usual and customary at the end of November.

Having construed the contractual obligation as involving using the usual and customary route at the end of November, and having, apparently, decided that there was no usual and customary route at that time, the learned judge turned to consider whether, although there was a route available, nevertheless the contract was frustrated. He did not think it necessary to choose which one of the solutions propounded for the resolution of this question he would adopt. The answer was the same in each case. "I feel no doubt at all that the continued availability of the Suez route was a fundamental assumption at the time the contract was made, that to impose on the sellers the obligation to ship by an emergency route via the Cape would be to impose upon them a fundamentally different obligation . . . and that if the parties to the contract had thought of the matter at the time, both, as reasonable men, would have accepted at once that, if the Canal was closed . . . the contract would be off." At this stage the only comment to be made is that if "the continued availability of the Suez route was a fundamental

assumption at the time the contract was made " is correct then the distinction drawn between the duty to perform by the route usual and customary at the time of the making of the contract or by that usual and customary at the time for performing the contract seems to be a distinction without a difference in this case.

Judgment was given in *Carapanayoti's* case on July 18, and on December 8 a case involving primary facts indistinguishable from it came before Diplock J.: *Tsakiroglou & Co., Ltd.* v. *Noblee Thorl* (*supra*). In the case stated, however, the Appeal Board of the Incorporated Oil Seed Association found as a fact that at the time of the making of the contract both parties contemplated shipment via the Suez Canal but (and these were mixed findings of law and fact) that (i) it was not an implied term of the contract that shipment should be made via the Suez Canal; (ii) the contract was not frustrated by the closure of the Suez Canal; (iii) the performance of the contract by shipping the goods via the Cape of Good Hope was not commercially or fundamentally different from its being performed by shipping the goods via the Suez Canal.

Having pointed out that the doctrine of frustration is not lightly to be applied, that lawyers have ever been more prone than merchants to cling to the letter of the contract, and that as a result *Carapanayoti's* case is one of the very few cases, if not the only one, when trade arbitrators have found a contract not to be frustrated and the court has found that it was, and that he would be reluctant to come to a different conclusion of law from that reached by McNair J., nevertheless the learned judge discovered a vital difference between the present case and *Carapanayoti's* case in finding (iii), *supra*.

In the first place he relied on the distinction drawn between primary facts, conclusions of fact and matters of law in *British Launderers' Research Association* v. *Hendon Borough Rating Authority* [1949] 1 K.B. 462. There it was said that " Primary facts are facts observed by witnesses and proved. . . . Conclusions from primary facts are, however, inferences deduced by a process of reasoning from them. If and so far as these conclusions can as well be drawn by a layman (properly instructed on the law) as by a lawyer, they are conclusions of fact for the tribunal of fact " (*per* Denning L.J. at p. 471).

It is the function of the court to determine whether, as a matter of law, a contract is frustrated. Should the court, having established the primary facts, then determine as a matter of law the question of frustration? Or is there a further conclusion of fact (finding (iii), *supra*) which should be put to and answered by the tribunal of fact, be it arbitrator or special jury? In the learned

judge's opinion this was indeed a matter for the tribunal of fact. He noted that in *Jackson* v. *Union Marine Insurance Co.* (1873) L.R. 8 C.P. 572, affd. (1874) L.R. 10 C.P. 125, this was just the question which Brett J. had left to the jury.

The appeal board had correctly considered this matter. Could finding (iii), a finding of fact, be assailed? Could it be said that there was no evidence that could reasonably support it? The answer to this must be in the negative in the case of an appeal board acting in a trade dispute and allowed to take into account not only the actual evidence but also their own personal knowledge and expertise. Could it be said that they had misdirected themselves as to the meaning of the question they asked themselves? Such an error could only be in the interpretation of the words "commercially or fundamentally different." Those words were words which a board of appeal of professional men engaged in the trade would clearly have the capacity of understanding and appreciating. Since this finding of fact was unassailable, Diplock J. found as a matter of law that finding (ii), *supra*, was correct.

Two comments only seem called for. First, if these conclusions are conclusions of fact then it would seem that in ninety-nine cases out of a hundred the conclusions of law which follow will be automatic and inevitable. Secondly, on Diplock J.'s view there is no discrepancy in law between *Carapanayoti* and *Tsakiroglou*: on similar primary facts, in the first case, McNair J., as tribunal of fact, concluded that there was a fundamental commercial difference; in the second, the appeal board reached the opposite conclusion. Yet some explanation of the discrepancy is needed. Might it not be that the appeal board had before it, perhaps in the form of personal professional knowledge of and expertise in the particular trade, evidence which was not available to McNair J.?

K. Scott.

CONTRACTS BY NON-TRADING CORPORATIONS—FORMALITIES—LAW REFORM

In their Eighth Report (1958, Cmnd. 622) the Law Reform Committee recommend the removal of a tiresome anomaly in the law as to corporations' contracts. Trading corporations, and companies incorporated under the Companies Acts, have long been able to contract through agents as well as under their common seals. But other non-trading corporations are subject to a rule of common law that they can validly contract only under their seals. There are two exceptions, it is true: contracts incidental to the corporation's

objects which have been fully executed, and contracts relating to common or trivial or particularly urgent acts. But these exceptions are so limited and so vague that they are more trouble than they are worth. The main rule would have been an intolerable nuisance to municipal corporations, universities, colleges, and many other bodies if it had not been very generally ignored in practice. Under the regulations governing many of them the affixing of their seals is, quite rightly, made an affair of some solemnity, unsuited to matters of everyday business; and the exception in favour of common transactions is too uncertain to be relied upon.

Section 74 (2) of the Law of Property Act, 1925, had indeed provided that " The . . . governing body of a corporation aggregate may . . . appoint an agent . . . to execute on behalf of the corporation any agreement or other instrument not under seal . . . " Simple-minded persons (with whom must be included the learned authors of Wolstenholme and Cherry's *Conveyancing Statutes*, vol. i, p. 345) supposed that this provision was exactly framed to meet the difficulty, and that it allowed all corporations to contract through agents in cases where, had they been individuals, they would not have had to use a deed under seal. But in *A. R. Wright & Son, Ltd.* v. *Romford Borough Council* [1957] 1 Q.B. 431 it was held by Lord Goddard C.J. that the subsection " can only refer to the execution of an agreement which would be binding on the corporation in spite of the absence of a seal," in other words an agreement falling within one of the two exceptions. It was then very hard to see what positive meaning the subsection had. The inconvenience caused by the *Romford* case, which awakened many corporate bodies to the painful reality of the law, prompted the reference to the Law Reform Committee.

The Committee's recommendation is that all corporations aggregate should be made subject to the same rules as are found in the Companies Act, 1948, s. 32. Many non-trading and charitable corporations, being incorporated as statutory companies, have the benefit of that Act already. The rules in effect allow companies to contract through agents authorised either expressly or impliedly in cases where the contract would not be required by law to be made under seal. If this recommendation were acted upon it would, as the Committee tactfully say, " render otiose " the provision in the Law of Property Act, 1925.

There is a real need for this proposed reform, as the facts of the *Romford* case have shown. Although it was somewhat strangely opposed before the Committee both by the Ministry of Housing and Local Government and by the Association of Municipal Corporations, the case for it is unanswerable. It is to be hoped

that this influential opposition will not prevent early legislation, and that Parliament's second attempt will be more successful than its first.

H. W. R. Wade.

CONTRACT—TRADE ASSOCIATION—NATURAL JUSTICE

Byrne v. *Kinematograph Renters Society, Ltd.* [1958] 1 W.L.R. 762 is an interesting decision on the principles of natural justice. It was a case of the domestic kind, concerned not with a public authority exercising a statutory power but with a commercial body which had an effective stranglehold on the distribution of films to cinemas, and therefore had the power to put a cinema proprietor out of business. This is typical of many drastic powers possessed by trade associations of various kinds. Is there any method of preventing their arbitrary exercise, and, in particular, of ensuring that anyone put in peril of his livelihood will be given a fair hearing? The answer given by Harman J., after a survey of the authorities, is "not unless the plaintiff is protected by contract." But contracts may be implied in unlikely situations, and the case also shows how far the court may go towards manufacturing a contract where some foothold for the rules of justice and fair play is evidently needed.

Films shown at cinemas are hired by the exhibitors from "renters" on a percentage basis varying with the number of tickets sold, so that it is important for the renters to have reliable returns of attendances from exhibitors. The defendant Society was the renters' protection organisation. It employed inspectors to visit cinemas both as a matter of routine and also in cases where the returns were suspect. One of their methods was to buy tickets at the beginning and end of the day and to compare the serial numbers with the exhibitor's return. This and other checks were carried out by two investigators at the plaintiff's cinema after a firm of renters had made a complaint about him. The investigators found a number of substantial discrepancies which the plaintiff could not explain. But not all the discrepancies were to his financial advantage; he was not accused of fraud, and the learned judge treated him as an honest man. His principal excuse was that it had been impossible to get staff to run the business properly. Nevertheless he was put on the barred list, his supply of films was cut off, and he was driven out of business—a punishment which the learned judge described as "altogether disproportionate."

Before the decision was taken the plaintiff was invited to a meeting of the investigation committee, where he made his defence.

But he challenged the proceedings on various grounds, for example that the paper containing the charges against him was not shown to him, that his wife was not allowed to give evidence, and that the excessive penalty showed that the decision could not have been made bona fide. These complaints all failed, for it was held that the plaintiff had had the charges fully explained to him and that the procedure of the committee had been conducted fairly and in good faith. Harman J. said that much as he deplored the methods of the defendants, he could not find that they had failed in the three requirements of natural justice: that the charge should be known to the accused; that he should be able to state his case; and that the tribunal should act in good faith. The action therefore failed on the facts.

The central part of the judgment, however, is concerned with the question of law: was the plaintiff entitled to be treated according to natural justice? When a statutory power is to be exercised, the right of an intended sufferer to make his voice heard before the blow falls is implied from the statute, since it is presumed that Parliament intends powers to be exercised fairly and with due consideration for all (see the last issue of this Journal at p. 226). When a club or a trade union expels a member his right to fair treatment is implied from his contract of membership. But what rights has a cinema proprietor against a renters' trade association, which has the power to put him out of business whenever they wish? As Lord Goddard said at first instance in *Russell* v. *Duke of Norfolk* [1948] 1 All E.R. 488, "If there was no contractual duty to hold an inquiry, how can there be a breach of contract in withdrawing the licence, however the inquiry was conducted?"

Harman J. met this difficulty by discovering a contract in the dealings which the plaintiff had with the investigation committee (J. I. C.): "The contract here, if there be one, must it seems to me come into existence when the plaintiff is invited to attend the inquiry by the J. I. C., and agrees to do so. The contract would then be that the inquiry should be fairly conducted, and, in my judgment, it would be right in a case of this sort to imply such a contract." The learned judge also said: "It seems to me that bodies like K. R. S., who exercise monopolistic powers and may ruin a man by their recommendations, ought not to act in an arbitrary manner or at the least that if they do, as this body did, set up an investigation committee which is a quasi-judicial body, they must be taken to hold out to those over whom they claim to exercise jurisdiction the assurance that the proceedings will be fair."

A contract is to be implied, therefore, in cases where the court sees strong reasons for subjecting a powerful commercial combine

to some measure of judicial control. But an end which is admirable in itself—and a step towards a solution of one of the major problems in the law today—is achieved only at the cost of straining the conception of contract. One cannot help feeling that contract is being pressed into service to fill a gap in the law of tort. The real complaint in a case like this is that a man is being deprived of his livelihood by wrongful means—not necessarily in breach of contract, but by means which the law condemns. But the law of tort, which protects a man's person and property so fully, does not protect his employment or his trade except to the limited extent of the law of conspiracy. The right to work is not protected. This lacuna is discussed by Professor Lloyd in his writings: see *Current Legal Problems*, 1957, p. 36. It is also the subject of some stimulating remarks in the judgment of Denning L.J. (as he then was) in *Abbott* v. *Sullivan* [1952] 1 K.B. 189, the cornporters' case. He conceded that there was no general action in tort for deprivation of livelihood (at p. 200) and that, if no contract could be found, " the action must be laid in conspiracy " (at p. 205). Yet the step forward from conspiracy to " destruction of livelihood " has been taken—and, moreover, on the English authorities—by the Supreme Court of Canada: *Orchard* v. *Tunney* [1957] 8 D.L.R. (2d) 273.

It is clear, at any rate, that a contract of some kind must be made out in order to support a claim to be treated with natural justice where the other party is merely exercising an ordinary legal liberty. In so deciding, Harman J. criticised certain dicta in *Davis* v. *Carew-Pole* [1956] 1 W.L.R. 833, and also cited a passage from Lord Parmoor's speech in *Weinberger* v. *Inglis* [1919] A.C. 606, the Stock Exchange case. The speeches in the latter case are (with one exception) somewhat difficult to interpret, for most of their lordships did not explain why the Committee of the Stock Exchange were obliged to obey natural justice in expelling a member. In case it should be thought that there is some more mystical reason at work, with the ghost of Dr. Bonham hovering near, it may be said that an explanation was given at the end of the final speech (Lord Wrenbury's) in terms of company law. Defiance of natural justice cannot by itself give rise to an action. Statute, or contract, or some other recognised legal duty, must provide the peg to hang it on.

H. W. R. Wade.

TRESPASS—BURDEN OF PROOF—RES IPSA LOQUITUR

The judgment of Diplock J. in *Fowler* v. *Lanning* [1959] 2 W.L.R. 241 is the first considered judicial opinion on the burden of proof in trespass, and it will probably be taken as settling a point that has long been agitated in the schools. By a writ the plaintiff claimed damages for trespass to the person committed by the defendant, and in his statement of claim he alleged that the defendant shot him, without alleging fault or giving particulars of negligence. The defendant took the preliminary point of law that the statement of claim was bad because it did not allege that the shooting was either intentional or negligent. This question of pleading involved indirectly the question of burden of proof, because under the present rules of pleading the plaintiff must allege and give sufficient particulars of negligence where the issue of negligence is part of his case.

The prevailing academic view is that under the old action of trespass the burden of proving inevitable accident rested upon the defendant. It seems, however, that no authority can be found to support this opinion, since the question was never considered. There is a dictum in *Weaver* v. *Ward* (1616) Hobart 134 that inevitable accident is in the nature of an excuse, but this may have referred merely to the pleading point that the issue had to be raised by the defendant. In the Middle Ages, as Mr. Milsom has recently shown, inevitable accident could be introduced under the general issue, if only as an appeal to the mercy of the jury; but in *Weaver* v. *Ward* the court assumed that it had to be specially pleaded, and the law was settled in the same sense by the later decisions in *Knapp* v. *Salisbury* (1810) 2 Camp. 500, *Boss* v. *Litton* (1832) 5 C. & P. 407, and *Cotterill* v. *Starkey* (1839) 8 C. & P. 691. Diplock J. pointed out that it was not permissible to use this rule of pleading to found an argument as to the burden of proof. For example, under the old rules of pleading a defendant to an action for trespass to land had to plead specially that the plaintiff was not in possession of the land in question, if he wished to raise that issue; he was not allowed to give evidence upon it under the general issue (*i.e.*, the plea of not guilty). Yet if the defendant raised the issue of possession, it was for the plaintiff to prove that he was in possession of the land. Here we have a case where an issue had to be raised by a special plea, and yet the burden of proof was cast upon the plaintiff. The law might well have been the same for the "excuse" of inevitable accident.

This absence of authority enabled Diplock J. to give effect to the general policy of burying the forms of action. He held that the

statement of claim disclosed no cause of action, and gave the plaintiff leave to amend.

Although the decision is satisfactory in reaching the result that the plaintiff in an action for personal injuries must now allege intention or negligence on the part of the defendant, it is somewhat puzzling to know what facts the learned judge expected the plaintiff to give by way of particulars of negligence. The judgment on this point runs as follows. "It may be—I know not—that, had the circumstances been set out with greater particularity, there would have been disclosed facts which themselves shouted negligence, so that the doctrine of *res ipsa loquitur* would have applied. In such a form the statement of claim might have disclosed a cause of action even although the word 'negligence' itself had not been used, and the plaintiff in that event would have been limited to relying for proof of negligence on the facts which he had alleged. But I have today to deal with the pleading as it stands. As it stands, it neither alleges negligence in terms nor alleges facts which, if true, would of themselves constitute negligence." This passage seems to concede that when the maxim *res ipsa loquitur* applies, the plaintiff need not give particulars of negligence beyond alleging the facts that bring the maxim into operation. This must be so, for the whole point of the maxim is that it aids the plaintiff when he does not know how the accident came about. There can be no sense in expecting the plaintiff in his pleading to invent imaginary particulars of negligence, when the law requires the defendant to give some explanation of the accident and excuse himself. It is true that imaginary particulars of negligence are common form in running-down cases, but these particulars date from a time when it was thought that *res ipsa loquitur* was wholly inapplicable to highway accidents. Also, it is always difficult to forecast whether the circumstances of a highway accident will be held to bring the maxim into operation. Even so, it seems probable that the common form particulars of negligence are not now legally necessary in many of the cases in which they are unthinkingly used.

If, then, a plaintiff need not give the usual particulars of negligence where *res ipsa loquitur*, it is difficult to understand why the allegation of the plaintiff in *Fowler* v. *Lanning* was not regarded as invoking that maxim. The statement that the defendant shot the plaintiff presumably implied that the defendant was in possession of a gun or other weapon capable of projecting missiles, and that a missile left the weapon and hit the plaintiff. Now the two conditions usually stated for *res ipsa loquitur* are that the sole control of the cause of the accident must lie with the defendant, and that the accident must be such as would not usually happen

without negligence. The allegation in *Fowler* v. *Lanning* would seem to satisfy these two conditions as clearly as any allegation possibly could. Having regard to the well-known rules of prudence which must be observed by those who carry weapons, a heavy burden rests on anyone who shoots another to show that he did it without negligence; and, except in such a rare case as *Stanley* v. *Powell* [1891] 1 Q.B. 86, the burden cannot in practice be discharged. There would seem to be no point in requiring the plaintiff, in his statement of claim, to set out every possible rule of prudence relating to the carrying of weapons, and to allege the breach of them.

On this question, as on so many others, the *Annual Practice* is a Delphic oracle, for on page 456 of the 1959 edition it states that " particulars must always be given in the pleading, showing in what respects the defendant was negligent," while on page 461 it states that " the court will never order particulars of any allegation . . . as to which the burden of proof lies on the applicant." This mode of expression may seem to call for a decision on the vexed question whether *res ipsa loquitur* shifts the burden of proof, but it is submitted that the maxim operates to dispense with particulars of negligence whether it shifts the burden of proof or not. In *The Kanawha* (1913) 108 L.T. 433 a vessel at anchor was run into and damaged by a vessel in motion, thus raising a typical case of *res ipsa loquitur*. In an action for damages, the owners of the vessel at anchor delivered a statement of claim in which they alleged that those on the vessel colliding with them did not take proper and seamanlike measures to keep clear. On a summons for particulars of the measures that should have been taken, the judge (Bargrave Deane J.) struck out the allegation of negligence, but allowed the action to proceed without particulars. He said: " If at the trial the plaintiffs make out further charges of negligence against the defendants which have not been pleaded, the court can give effect to them." The action of the judge in striking out the allegation of negligence can hardly be supported, but his refusal to order particulars of matters which were within the sole knowledge of the defendants makes good sense.

GLANVILLE WILLIAMS.

SALE OF GOODS—YACHT—BUYER'S RIGHT TO REJECT

THE Sale of Goods Act, 1893, s. 11 (1) (*c*), destroys a buyer's right to reject goods for breach of condition if they are *specific* and the property in them has passed to him or if, under an entire contract, he has " accepted " all or any of them, whether by telling

the seller so, by dealing with them after delivery inconsistently with the seller's ownership, or by retaining them too long after delivery without rejecting them (s. 35). Does the passing of the property in future or unascertained goods have a similar effect? Various decisions referred to below show that the property in such goods may pass defeasibly without destroying the right to reject but in *McDougall* v. *Aeromarine of Emsworth, Ltd.* [1958] 1 W.L.R. 1126 an English court considered this question for the first time in relation to the standard form shipbuilding contract sponsored by the Ship and Boat Builders National Federation. A shipbuilding contract is for the sale of goods, *i.e.*, the completed vessel, and not merely for work and materials: *Reid* v. *Macbeth & Gray* [1904] A.C. 223.

The defendants agreed to build for the plaintiff by May 1, 1957, although this date was not guaranteed, a certain type of yacht for the 1957 racing season. A common form clause, intended to protect the buyer against the sellers' insolvency during construction, provided that "The said craft together with all materials equipment fittings and machinery purchased by the builders specifically for the construction thereof whether in their building yard workshops water or elsewhere shall become the absolute property of the buyer upon the first instalment being paid hereunder . . ." That instalment was payable on signature of the contract and four more on completion of various stages of construction. Satisfactory performance of the yacht on her trial run was to be taken as indicating completion according to specification.

Modifications requested by the buyer delayed the trial run until June, when the yacht proved unseaworthy due to gaping seams, which the builders undertook to respline. On relaunching in July she was still unseaworthy. In September and October the builders offered to remedy the defects on terms inconsistent with the original bargain or to allow a discount. Rejecting these offers, the buyer claimed the return of all sums paid as on a total failure of consideration, which entailed proving that the vessel either never became or else ceased to be his property before issue of the writ.

As there was no evidence that construction had begun or materials been purchased before the first instalment was paid six days after signature of the contract, Diplock J. held the clause passed no property in anything at that time. Even if, contrary to his construction of the clause, it later vested the property in yacht or materials in the buyer as construction proceeded, it did so only defeasibly as in the case of instalment deliveries of goods under an entire contract, where the property in each instalment passes to the buyer on delivery but may be divested at his option if the total

quantity agreed is not ultimately delivered: *Colonial Insurance Co. of New Zealand* v. *Adelaide Marine Insurance Co.* (1886) 12 App.Cas. 128, J.C.P.C. Lord Dundas applied the same principle in the very similar Scottish shipbuilding case of *Nelson* v. *William Chalmers & Co., Ltd.*, 1913 S.C. 441, 453. Thus by early September, when the yachting season was nearly spent, the builders were clearly in breach of condition by failing to deliver a properly completed yacht within a reasonable time after the specified delivery date. Their offers of September and October to remedy the defects on new terms constituted repudiations of the contract which the buyer might and did accept. Thereupon any property which might have vested in him was divested and a total failure of consideration ensued.

Three comments may be made. First, Devlin J.'s comparable dictum in *Kwei Tek Chao* v. *British Traders & Shippers, Ltd.* [1954] 2 Q.B. 459, 487, might have been cited, namely that under a c.i.f. contract delivery of the shipping documents to the buyer vests the property in the goods in him conditionally, subject to it revesting in the seller if, on examination, the goods prove not to conform to the contract. Secondly, such decisions make it illogical that the passing of the property should prevent rejection of *specific* goods which the buyer has not examined. Even where he has examined them the courts apparently prefer, where possible, to hold that inability to reject has arisen from an acceptance under the other limb of section 11 (1) (*c*): *Leaf* v. *International Galleries* [1950] 2 K.B. 86; *Long* v. *Lloyd* [1958] 1 W.L.R. 753, noted in [1958] C.L.J. 166. Thirdly, it is remarkable that a standard shipbuilding contract should purport on signature of the contract to pass the property in a vessel yet to be built.

J. W. A. Thornely.

COMPANY—OPPRESSION OF MINORITY

Re Harmer (*H. R.*), *Ltd.* [1959] 1 W.L.R. 62 gave to the English Court of Appeal its first opportunity to consider section 210 of the Companies Act, 1948, under which a member may apply to the court for relief if the affairs of his company are being conducted in an oppressive manner, and the facts might have given rise to a winding up under section 222 (*f*). After some years of quiescence, the new section is rapidly establishing itself as the sharpest weapon at the disposal of oppressed minority shareholders, and the judgments in this case whet the edge given to it recently by the House

of Lords in *Scottish Co-operative Wholesale Society, Ltd.* v. *Meyer* [1958] 3 W.L.R. 404, noted in [1958] C.L.J. 152.

What Jenkins L.J. called this "truly lamentable litigation" was caused by the activities of Mr. Harmer senior, a philatelic dealer, now eighty-eight years old, who had a high international reputation in his trade. He incorporated his business in 1947, forming a company with two types of ordinary shares — "A" shares which were entitled to the residue of profits, and "B" shares which carried all the votes. He gave shares to his sons, Cyril and Bernard; and at the time of the petition they held about 4,000 "A" shares each while the father owned 1,000. But the father (and his wife) held nearly 800 "B" shares to the 100 held by each son (and his wife). The company's articles appointed the father, Cyril and Bernard directors for life, made the father chairman of the board, with a casting vote, and appointed him "governing director," a post not further defined. Bernard in fact spent most of his time in New York conducting the affairs of H. R. Harmer Inc., the family's American company.

Unhappily, the father considered that he was still entitled to run the business as it always had been run, under his personal and sole direction. He assumed powers he did not possess, ignored the decisions of the board of directors, and asserted up to and during the present litigation that he had full power to do exactly as he pleased while he had voting control. He set up a branch in Australia; dismissed employees; used his casting vote to co-opt "safe" directors on to the board "who often did not hold office for long"; prohibited board meetings; engaged detectives to watch the staff; secured payment of his wife's expenses out of the funds; negotiated sales and vetoed leases—all contrary to the decisions and wishes of the other directors. His experience was of great value to the company. "Unfortunately," said Roxburgh J. "in common with all of us, he gets older and older." The sons objected to what Roxburgh J. had no difficulty in describing as "autocratic interference," and his Lordship made an order under section 210 restraining the father from continuing that course, and appointing him "president" for life without rights, powers or duties (a somewhat extraordinary provision). The Court of Appeal upheld his order.

It was agreed on all sides that the facts proved would have allowed a "just and equitable" winding-up order under section 222. This important circumstance left the way open for the use of section 210. Secondly, their Lordships decided that the section did not demand anything in the nature of discrimination between shareholders or classes of shareholders. Nor was it relevant that

the sons had acquired their shares originally by way of gift; there was no evidence that they had thereby agreed to the father riding roughshod over the duly constituted board. They had to prove "oppression," something "burdensome, harsh and wrongful" in the definition of Viscount Simonds in *S. C. W. S.* v. *Meyer* (*supra*), which the court here adopted. In deciding this question, the court stressed the need to look at the story as a consecutive whole. It is also of interest that Jenkins L.J. was prepared to gather assistance from the cases decided before 1948 on "just and equitable" winding up, in order to fashion correctly his approach to the issues before the court.

The affairs of the company had, indeed, fallen into such desperate straits that it was not difficult for their Lordships to find "oppression." The father had since 1948 used every method to control or defy the board; everyone seems to have brought his own tape-recorder and solicitor to the meetings. Jenkins L.J. rejected the contention that the issue was affected by lack of pecuniary benefit to the father: "If there is oppression, it remains oppression even though the oppression is due simply to the controlling shareholder's over-weening desire for power and control and not with a view to his own pecuniary advantage." Romer L.J. agreed with Roxburgh J. that the assumption of powers which he did not possess and their exercise against the wishes of those who had the major beneficial interest, but a minority of votes, was prima facie oppression and shifted the burden of proof. "So far from discharging the burden" the father had shown only that prompted by "either just lack of temper or the motive of asserting or attempting to sustain an absolute overriding power of control in the face of opposition . . . he has on many occasions acted in complete disregard of the interests of the company as a whole." Furthermore Willmer L.J. doubted if it made any difference whether the father knew that he was exceeding his powers; oppressive conduct remained oppressive even if unconscious. Nevertheless, "that which is done consciously strikes with a sharper edge" and would give rise to the need for a "stringent order to protect the interests of the shareholders."

Thirdly, however, two more arguments were advanced for the father, (i) that the sons had been oppressed, if at all, only as directors, not as *members*; and (ii) that, having voting control, the father could have secured lawfully the performance of what he had done irregularly; and that, therefore, the sons could not complain. All three members of the court accepted (i) that a petitioner under section 210 must show that there has been oppression of him "in his capacity as a member of the company as such" (Jenkins L.J.),

and (ii) that "the mere use of voting power at board meetings or at a general meeting to secure the passing of resolutions which the other members of the board or shareholders oppose would not in general constitute oppression" (Romer L.J.). But that was not the present case. It had been argued that the father could not have done lawfully all that he had done. But even if he could, the sons were both directors and members; and as members, they were entitled to expect that the proceedings of the board would be properly carried on; that the collective experience of the directors would be at the company's disposal; that the board would function as a board; that its decisions would be executed; and that the proper procedures would always be followed. The father's refusal to allow any of these expectations to be realised constituted oppression of them *as members*. "The proper procedure," said Jenkins L.J., "cannot be put on one side as mere machinery." Nor was it open to him, after such a course of conduct, to say that the sons might have restrained the irregular acts by injunction: "a wrongdoer in this field" cannot "complain that the person wronged might have chosen another remedy," when the case is otherwise appropriate for relief under section 210.

In these passages the judgments in *Re Harmer* contain statements of company law which reach out far beyond the confines of section 210, and transcend in their importance the issues raised by the case. The present writer has, in earlier pages of this journal, advanced the rather heterodox proposition that a shareholder has not merely particular rights under the articles of association, but a *general contractual right to have the articles observed* by the company; and that this right extends to the enforcement by injunction or declaration of "outsider-rights," which the articles purport to bestow upon himself or upon others, provided always that he makes out his case *qua member*, and does not appear in the capacity of "outsider"; see [1957] C.L.J., pp. 207–214; [1958] C.L.J. 150. Such propositions demand a reappraisal of many earlier cases, *e.g.*, *Hickman* v. *Kent or Romney Marsh Sheep-breeders Association* [1915] 1 Ch. 881. A certain satisfaction may be allowed at the fact that all three judges in the present case clearly recognise that right. Jenkins L.J. accepted that the father had deprived "the minority of shareholders of their right as members of the company to have its affairs conducted in accordance with its articles of association." Romer L.J. stated firmly that "shareholders are entitled to have the affairs of a company conducted in the way laid down by the company's constitution"; and Willmer L.J. agreed. These, it is submitted, are the first clear judicial statements of the principle which must lie behind cases such as *Quin & Axtens, Ltd.* v. *Salmon*

[1909] A.C. 442. They show that the petitioners in this case might, as Jenkins L.J. seemed to recognise, have based their action upon breach of contract by the company and sought an injunction. Section 210 provides a more flexible remedy than any such action could have obtained; but the basis of the "oppression" which allowed that section to operate was the infringement of the right of the sons, as members, to have the articles observed, and a breach of the articles will not in every case constitute "oppression." The firm establishment of that right has the most far-reaching consequences for company law, and not least for the Rule in *Foss* v. *Harbottle*.

Re Harmer is, therefore, likely to figure prominently in the company law of the future. But its lesson for fathers may be different. Autocratic parents might well be advised to bring their sons into the business in a different manner. If Cyril and Bernard had been given *debentures*, with the same rights to share in the profits and to sit on the board, they would have had at their disposal neither section 210, nor, probably, any other remedy as far as the conduct of the company's affairs was concerned. They would not have been *members* at all. *Salomon* v. *Salomon & Co., Ltd.* [1897] A.C. 22 shows the value of the debenture ploy; and if fathers begin to use it in order to retain control of the family business at eighty-eight, the next Company Law Amendment Committee will probably be asked to devise a more rigorous prohibition of aged directors.

K. W. Wedderburn.

TRUST—FUND RAISED BY PUBLIC SUBSCRIPTION—CHARITABLE TRUSTS (VALIDATION) ACT, 1954

Re Gillingham Bus Disaster Fund [1959] 1 Ch. 62, C.A., concerned a fund raised by a public subscription in memory of boys killed and injured in a certain road accident. The fund had been raised in various ways including street collections from anonymous donors, after a letter had appeared in the press written on behalf of the mayors of certain towns in the locality. The mayors, having received the subscriptions, found themselves with a substantial surplus after devoting what they could for the benefit of the victims of the disaster—for the latter (or their representatives) had recovered compensation elsewhere. The question therefore arose whether the fund was held upon charitable trusts so that the surplus might be applied *cy-près*; or whether the trusts had failed so that the surplus passed either as *bona vacantia* to the Crown or, by way

of resulting trust, to the original subscribers. Harman J., at first instance ([1958] Ch. 300), held that there was a resulting trust for the donors, since the Crown had not satisfied him that all or any of the donors had parted with their money out and out. He therefore ordered an inquiry to ascertain whether the donors could be found; and he added that, if it turned out that they could not be found, the remaining money should be paid into court in the ordinary way, for (in spite of a dictum by Jenkins L.J.) the fact that they could not be found would not advance the Crown's rejected claim to the money as *bona vacantia*. In the Court of Appeal the Crown's claim was not pursued; the appeal was dismissed (Ormerod L.J. dissenting); and leave was granted to appeal to the House of Lords.

It was assumed, both by Harman J. and by the Court of Appeal, that all the various donors had subscribed on the terms of the letter, inviting subscriptions, which had appeared in the press. The objects of the memorial fund, as stated in this letter, were " among other things " (i) to defray the funeral expenses of those boys who had died, (ii) caring for those disabled, (iii) " and then to such worthy cause or causes . . . as the Mayors may determine." On the face of it, therefore, there was clearly no charitable trust; for its first two limbs were merely private trusts, whilst the third was not confined to worthy objects which are charitable and so was *prima facie* void for uncertainty. It was contended, however, that this third limb was cut down (as from July 30, 1954) to a valid charitable trust by the Charitable Trusts (Validation) Act, 1954, as being an " imperfect trust provision," within the meaning of that Act, contained in an " instrument taking effect before December 16, 1952," in that it was for objects so described that " consistently with the terms of the provision, the property could be used exclusively for charitable purposes, but could nevertheless be used for purposes which are not charitable " [s. 1].

The difficulty about this contention, of course, was that (" consistently with the terms of " the letter) the fund could not be used *exclusively* for charitable purposes; for its primary trusts, contained in the first two limbs, were clearly non-charitable. The Attorney-General, however, contending on behalf of charity, relied here upon section 2 (3) of the Act whereby a " disposition . . . creating more than one interest in the same property " is to be treated for the purposes of the Act " as a separate disposition in relation to each of the interests created." The crucial question, therefore, was whether it could be said here that a " disposition " had created more than one interest in the contents of the memorial fund, or in what was

left of it after the two primary objects (funeral expenses and care of the injured) had been achieved.

As to this, Harman J. held that the original letter to the press was not a " disposition " of anything—for it was merely an appeal; and that one has to judge the matter as at the date on which the appeal was made—for section 1 (3) of the Act indicates that a written appeal for gifts is deemed to be an instrument taking effect when it is first issued. In the Court of Appeal, however, the unanimous view seems to have been that the " dispositions " here were made by the subscribers themselves, on the terms of the published letter; but the court held nevertheless (Ormerod L.J. dissenting) that the Act did not apply, since it would not be common sense to deduce that each subscriber had, when giving his coin, created several distinct or separate proprietary interests in it.

This severely technical point, involving the true construction of section 2 (3) of the Act, is perhaps unlikely to arise again. Nevertheless, the Act of 1954, though curiously confined to imperfect trust provisions contained in instruments " taking effect before December 16, 1952," is likely to remain important for many years. The number of purpose trusts, made before that date for some wide and long-enduring purpose, and so drafted that, consistently with the terms of the trust, the trustees may, but need not, confine the trust-benefits to objects that are charitable in law, is probably very large indeed. And it is probable that comparatively few of them are outside the Act as being trusts of which [s. 2 (2)] the trustees had, before December 16, 1952, distributed property or income on the footing that the trust was invalid, or as being trusts which [s. 4 (2)] the court in proceedings begun before that date had already held to be invalid before the Act came into force. It is therefore noteworthy that Harman J. held ([1958] Ch. at p. 306), and the majority of the Court of Appeal were inclined to think ([1959] 1 Ch. at pp. 75, 77) that the Act does not cure a case—such as a trust for " such purposes as the trustees think fit "—in which there is no specific indication of a charitable purpose or of charity. Here again, however, Ormerod L.J. (*ibid.*, at p. 80) objected, and on the telling ground that, since the operative words of the Act are clearly wide enough to cover such a case, it would be improper to invoke its long title in order so to restrict them.

If the case of the Gillingham Bus Disaster Fund reaches the House of Lords, it is to be hoped that their Lordships will see fit to settle this fundamental question. In the Court of Appeal the majority judgments expressed no final opinion upon it, preferring

to decide the case solely upon the narrow ground that the subscribers had not created, for the worthy causes, a separate interest within the meaning of section 2 (3) of the Act.

S. J. Bailey.

HUSBAND AND WIFE—DESERTED WIFE—MATRIMONIAL HOME—MORTGAGEE

There is fresh news of deserted wives and their rights in their matrimonial homes. *Churcher* v. *Street* [1959] 2 W.L.R. 66 is a decision of Roxburgh J. illustrating the court's discretionary power to give possession of the matrimonial home to a purchaser with notice from the husband, despite the equitable interest which the wife has been said to have in the line of cases starting with *Bendall* v. *McWhirter* [1952] 2 Q.B. 466. The case has some piquancy since Roxburgh J. was the last English judge to set his face firmly against this novel interest in land (in *Thompson* v. *Earthy* [1951] 2 K.B. 596) before the winds of change began to blow. He has now had to bow before them. But almost simultaneously, and as if to intensify the irony, the Supreme Court of New South Wales has upheld *Thompson* v. *Earthy* and refused to follow *Bendall* v. *McWhirter* and its offspring. This is not the first time that the Australian courts have shown their distaste for this innovation, which in addition to incurring criticism in this country may now be marked "rejected for export."

Churcher v. *Street* is a sequel to *Street* v. *Denham* [1954] 1 W.L.R. 624. In 1942 the husband had deserted his wife for his mistress, leaving the wife in the matrimonial home. He later arranged a series of transactions with the object of getting the wife out of the home and the mistress in. He bought another house for the wife, but at the crucial moment she refused to move. He also raised money on loan from his family trustees with which he financed the purchase of this second house and paid off a mortgage on the matrimonial home, and to secure this loan he mortgaged both houses by legal charge to the trustees. The trustees naturally knew all the facts, and so were purchasers with notice of any rights that the wife might have. In 1951, relying on *Thompson* v. *Earthy*, the husband conveyed the matrimonial home to the mistress, and in 1952 the mistress sued the wife for possession. But the law had by then changed, and the failure of her action was reported in *Street* v. *Denham*. This left the wife in possession; but she was hard up, and paid no interest on the mortgage after 1954, and she also let the house fall into disrepair. The trustees

therefore sued for possession in order to realise their security, and Roxburgh J. made a conditional order in their favour.

This decision follows in a direct line from *Jess B. Woodcock & Sons, Ltd.* v. *Hobbs* [1955] 1 W.L.R. 152, where the Court of Appeal explained the discretion which they had assumed to temper the wind to the deserted wife. In that case the wife had been allowed to remain in the house after it had vested in the British Transport Commission by nationalisation. Later, on denationalisation, the house was sold to a purchaser who had notice of the wife's position. But she had had four years of rent-free occupation on the mistaken assumption that she was a caretaker and she had refused the offer of a tenancy. On these facts the court, holding that the wife's rights against a purchaser could be no greater than her rights against her husband, ordered her to vacate the house in three months. Against her husband, of course, her rights would have been entirely at the court's discretion under section 17 of the Married Women's Property Act, 1882. But all attempts to explain how section 17 can apply between parties who are not husband and wife have so far failed. Roxburgh J. felt obliged "in this court, and in this court only," to allow that the wife could claim her "equity" and he said: "I do not think that there are any limitations upon this recently judge-made discretion." But the facts before him were that the desertion had happened sixteen years ago, that the husband had made very reasonable provision for the wife by buying another house for her, and that the immediate sufferers were the beneficiaries entitled to the trust fund which the trustees had quite properly invested in the mortgage. Roxburgh J. therefore made an order for possession at the end of six months, unless the wife would give satisfactory covenants for payment of interest and maintenance of the property. "Where people who have lent money are concerned, a deserted wife must sooner or later try and mitigate the damage which she has suffered in the practical sphere."

The *Woodcock* case was notable for the short judgment of Parker L.J. (as he then was) in which he appeared to reject the new theory that a deserted wife has an equitable title of any kind, and confined her rights against later purchasers to cases where the transaction was "a device to get the wife out for the husband's benefit." But since then her interest has been received into the Chancery Division, though as a "mere equity," and without enthusiasm: *Westminster Bank, Ltd.* v. *Lee* [1956] Ch. 7, noted in [1955] C.L.J. 158. Roxburgh J. has now received it there once more and with equal uneasiness. He suggests that its justification may be that if the courts had not invalidated some of the more

scandalous transactions, such as sham sales by husbands to mistresses, Parliament would have intervened. But legislation would be preferable, he suggests, "because, in order to prevent certain cases of injustice to deserted wives, a position has been brought about which may produce considerable injustice to other people unless each case is brought before the courts, which is a course involving considerable expenditure." One wonders whether the responsibilities of Her Majesty's judges really include the intelligent anticipation of Parliament.

Australian courts have preferred to stand in the old ways. *Dickson* v. *McWhinnie* (1958) S.R.(N.S.W.) 179 is all the more impressive because the recent English cases are fully considered and valiantly explained away. After fifteen pages of close analysis the judgment of the Supreme Court of New South Wales concludes: "Notwithstanding the many expressions of opinion by Lord Denning, we think, with all respect, that a deserted wife has no interest, legal or equitable, in the matrimonial home, and no equity, as we understand the word, enforceable against a purchaser of the land whether with or without notice of her occupancy and that she is a deserted wife. The utmost that can be said, in our opinion, is that where proceedings by that purchaser to recover possession are taken against the wife in a court which has a discretion to postpone execution of its order, the facts that the premises sought to be recovered were the matrimonial home and that the wife is a deserted wife are circumstances to be considered in the exercise of whatever discretion there is to postpone the date for giving up possession. We are of opinion that *Thompson* v. *Earthy* was rightly decided and we agree with what Roxburgh J. said in that case." In concluding that the deserted wife's equity was the single-handed achievement of Lord Denning the court gave weight to the numerous expressions of doubt which have fallen from his brethren on the bench. There is also a quotation from New Zealand which might be pondered in England. In *Shakespear* v. *Atkinson* (1955) N.Z.L.R. 1011 at 1019 Finlay J. called the new English doctrine "a law which will, I fear, prove, to say the least of it, unsettling and burdensome and productive of complications where none now exists; and without any injustice being involved, for the rights of a deserted wife are the subject of monetary adjustment—with a free home she gets less maintenance; without it, she gets more." As Roxburgh J.'s new decision shows, the complications are such that the court can solve them only by assuming unbounded discretionary power. That is a doubtful blessing.

H. W. R. Wade.

LEASE—FORFEITURE—DENIAL OF TITLE IN PLEADING

In *Warner* v. *Sampson* [1959] 2 W.L.R. 109 the Court of Appeal reversed the decision of Ashworth J. noted in [1958] C.L.J. 172. It had been held at first instance, following authority both ancient and modern, that a lease was forfeited beyond hope of relief if the tenant denied the landlord's title, and that this severe penalty could be incurred merely by the common pleader's traverse ("the defendant denies each and every allegation") at the end of the tenant's defence in an action by the landlord. In the former note it was suggested that, interesting as this feudal relic might be, it was high time that it was brought within the jurisdiction to grant relief, or else abolished altogether. Abolished now it is, according to Lord Denning who was sitting in the Court of Appeal. But Hodson and Ormerod L.JJ. chose the alternative of confession and avoidance: they did not challenge the ancient rule, but they held that it was not called into play by a mere pleader's denial; they also held that, alternatively, the lapse could be cured by amendment of the pleading, and that in this particular case the landlord had never enforced the forfeiture effectively.

Lord Denning surveyed the old authorities on the feudal rule and held that ". . . when the feudal tenures died out, the law on the subject died too." "I have no hesitation in holding that a denial in a pleading of the landlord's title does not today give rise to a forfeiture." Tenure between landlord and tenant is, however, by no means dead. Lord Denning's point is rather that the rule is quite unsuitable to modern times and much too severe in operation. He pointed out, as was mentioned in the earlier note in this Journal, that the landlord was sufficiently protected by the rule that the tenant is estopped from denying the landlord's title. He quoted aptly the words of Lord Atkin: "When these ghosts of the past stand in the path of justice clanking their medieval chains the proper course for the judge is to pass through them undeterred."

Hodson and Ormerod L.JJ., on the other hand, did not join in this enterprising piece of spring-cleaning. The Court of Appeal had, after all, looked at the old doctrine with tolerance if not with affection in *Wisbech St. Mary Parish Council* v. *Lilley* [1956] 1 W.L.R. 121, where Lord Evershed M.R. had said that he did not doubt that even today the court would follow it. They therefore decided the case on the more limited grounds already mentioned. The court should always lean against forfeiture. A mere denial in a pleading did nothing more (it was held) than put the other party to proof, and that could be done, according to the rules of the game of pleading, without any serious intention to dispute anything

in particular. So nicely are words weighed here that the landlord had acknowledged that on the authorities there could be no forfeiture if the tenant had merely said that the facts were "not admitted," yet he claimed forfeiture because they were "denied." In equating these expressions, and in holding that a mistake could in any case be remedied by amendment, the court has now overruled *Kisch* v. *Hawes Brothers, Ltd.* [1935] Ch. 102.

According to the majority judgments it seems that the medieval chains are still clanking, but in a less menacing manner than of yore.

H. W. R. Wade.

LEGISLATIVE DRAFTING IN LONDON AND IN WASHINGTON *

REED DICKERSON [1]

THE meetings of the American Bar Association held in London in 1957 furnished an incidental but valuable opportunity to inquire into the methods of English legislative draftsmanship and to make some useful comparisons with its counterpart in Washington.

The first striking fact that emerges in such a comparison is that almost all the public laws enacted by Parliament are drafted by one small group of men, the expert draftsmen of the Office of the Parliamentary Counsel.[2] This is in sharp contrast to the situation in Washington, where legislation is prepared by the Offices of the Legislative Counsel of the House and Senate, by members of the professional staffs of the many standing and special committees of Congress, by the legal staffs of the executive departments and agencies, and even by members of the public.[3] Since this aggregate is very large, the question immediately arises: Why so few and so concentrated in London and why so many and so dispersed in Washington?

One obvious explanation would seem to be that the greater size and complexity of the United States must inevitably result in a larger number of, and more difficult, legislative problems, too large for any single drafting group to handle. But even a cursory examination of the recent statute books shows a physical volume of English public laws quite comparable to that appearing during the same period in the Federal Statutes at Large. Indeed, there is some reason to believe that Parliament's ultimate legislative responsibility may even be greater than that of Congress, since it includes matters that in the United States would be the subject of state control or otherwise circumscribed by the Constitution. But whatever the exact ratio may be, it hardly parallels that formed by the respective numbers of participating draftsmen.

* This article has already appeared in the American Bar Association Journal, 1958, and is here republished with consent.

1 Professor of Law at Indiana University School of Law; author of *Legal Drafting* (1954); formerly of the Office of General Counsel, Department of Defense, U.S.A.

2 Exceptions: Consolidated Fund Bills; Statute Law Revision Bills; Bills extending exclusively to Scotland; Private Members' Bills.

3 Members of Congress sometimes draft legislation, but for the most part they cannot take the time.

Another, and more satisfactory, explanation is that the British draftsmen in the Office of the Parliamentary Counsel are permitted to make an enormously more efficient use of their time than the draftsmen of American Federal legislation. This is rooted for the most part in the much tighter control of the Government [4] over the legislative programme. With the legislative and executive branches fused in the persons of the cabinet ministers, who are also members of Parliament, and with the Government in strict control of the use of parliamentary time, the chances of the legislature's failure to support the Government's programme is much less in England than it is in the United States. (Failure to support the programme would bring down the Government.) This control is enhanced by a more effective integration of policy decisions and a significantly tighter party discipline. The result is that once the Government decides to push a legislative measure its ultimate enactment becomes almost a certainty. It is rare for the Government to have to abandon a bill. Conversely, a bill sponsored by an individual member of Parliament has a relatively small chance of success. In Washington, on the other hand, all bills are individually sponsored in form and a large proportion of them are individually sponsored in substance.

Since the Office of the Parliamentary Counsel directs its efforts almost exclusively toward Government bills and serves only the political party in power, it follows that an overwhelmingly large proportion of the bills drafted by that Office are successful and a correspondingly small proportion are unsuccessful. In contrast, it seems safe to say that the greater part of the Washington draftsman's efforts are ultimately unproductive.

A third, though less important, explanation is that many subordinate legislative matters that in Washington are handled as straight legislation have in London been turned over to the executive agencies to be handled principally as administrative regulations, with an assent or acquiescence from Parliament.

Because of the constitutional separation of powers in the United States, there is an important distinction between legislation enacted by Congress and that in effect enacted by executive agencies in the form of administrative regulations. Constitutionally, Congress is supposed to be incapable of abdicating its legislative functions, and the kind of legislative function that has in fact been delegated to the individual executive agencies has been legitimated by accompanying the authorisation with general statutory guides or by confining it in closely restricted channels. As a result, the scope of the

[4] *i.e.*, "the Administration," in Washington terminology.

regulatory activities of United States executive agencies has been more modest than in England. However, within the areas within which these agencies have been allowed to operate, they have for the most part been allowed to act without further Congressional participation, except that inherent in reporting and publication requirements and in Congress's general appropriation and investigatory powers.

Compare the role of " delegated " or " subordinate " legislation in England. Free of such constitutional inhibitions, Parliament has seen fit to delegate a significant part of the overall legislative job to the executive agencies, and in each case the authority of the particular agency is measured wholly by the charter granted by the parent statute relating to the subject-matter in question. While broadening Parliament's legislative reach, as well as that of the Office of Parliamentary Counsel, it has put a relatively larger burden on the executive agencies.

Delegated legislation is of three major kinds, depending upon the degree of control retained by Parliament. Although once Congress has delegated legislative authority it ordinarily retains no direct string on it, the same is not true in England, where general guide lines for parliamentary participation are found in the Statutory Instruments Act, 1946. In the usual situation, the parent statute provides that the regulations issued will stay in effect unless either House carries a resolution against it within forty sitting days.[5] The closest analogue in the United States is the reorganisation plan effectuated under the Reorganization Act of 1949. A second type is the regulation that becomes effective only if approved by a resolution of each House. This is much less common, and its usefulness as delegated legislation lies in the fact that although parliamentary action is required the burden of preparation and development rests on the particular agency and the result (as with the first type) must be taken whole or rejected whole. Such a regulation is not subject to committee action and it may not be amended on the floor. In fact, even the most controversial regulations can get an affirmative resolution in one parliamentary day. The third important type, which corresponds most closely to regulations in the American sense, is that to which no string is attached. Although in volume this kind of regulation looms large, it is confined to matters of comparative triviality.

Besides these three major kinds of delegated legislation, there is a fourth, but very exceptional, type. This is used in cases in which

[5] Some instruments must be submitted to Parliament in draft and do not become effective until the 40 sitting days have elapsed. See s. 6 (1) of the Statutory Instruments Act, 1946.

emergency action is necessary, or in those in which it is desirable to prevent forestalling, but the importance of the subject-matter demands affirmative resolution (*e.g.*, orders imposing customs action). Here the parent statute provides that the regulations authorised will be effective for four weeks only, unless they are affirmatively approved by both Houses.

Because (I suspect) a significant number of regulations of types one and two correspond to what would normally be enacted as law by Congress,[6] a comparison of drafting methods should probably include a description of how those are drafted in England. On this, a brief word later.

One field, not now very important, lies well outside the range of legislation and regulation already discussed: legislative matters falling within the royal prerogative. The most important area here is the military, as to which the Crown retains a number of powers. With respect to these the Crown may legislate in the Queen's name, usually in the form of orders and sometimes in the form of regulations, but always without needing an enabling act of Parliament or its later approval or acquiescence. Parliament could, of course, step in and take charge of this area at any time.

So much for the general context in which legislation is prepared. What about the draftsmen and their methods?

The Office of Parliamentary Counsel dates from 1869. Before that time, much of England's legislation was drafted in the Temple by persons with little or no experience. The Treasury, in the exercise of its management (as distinct from money) functions, which correspond to those exercised by Washington's Bureau of the Budget, established the Office and manned it with the Home Office's draftsman, Lord Thring, and an assistant. These two lawyers became the draftsmen of the great bulk of government legislation. In any period this would be no mean feat. In a day before typewriters and shorthand it must have been extraordinary.

Although the Treasury remains the nominal sponsor of the Office of the Parliamentary Counsel, in practice the Office works in closer liaison with the cabinet office. But, unlike the Offices of the Legislative Counsel of the House and Senate in Washington, it remains the servant of the executive branch rather than the legislative.

The present staff consists of a First Parliamentary Counsel, a Second Parliamentary Counsel, five undesignated Parliamentary Counsel, and ten Assistant Parliamentary Counsel. This total of seventeen draftsmen compares with eleven for the Office of the

[6] This suspicion is based on a comparison of the English and American military laws. However, Henry P. Rowe writes that he doubts that it has yet been verified generally.

Legislative Counsel of the Senate and ten for that of the House of Representatives.

The First Parliamentary Counsel assigns the work, but beyond that he does a minimum of office administration, devoting as much time as he can to drafting. The six other Parliamentary Counsel, once they have received their assignments, work independently and autonomously, except that each has the services of one of the Assistant Counsel, who rotate under a system of approximately one-year assignments. On most bills, therefore, the lawyers work in pairs, and it is only in the case of a relatively few of the less important bills that either works solo. This in general corresponds to the " buddy system " used in some of the states of the United States. The fact is significant because it confirms what many believe to be an essential characteristic of drafting—the team approach. The individual Parliamentary Counsel concerned remains solely responsible for the result, but he has the benefit of the cross checking and counter-balancing of his Assistant. In this respect, the Offices of Legislative Counsel of the Senate and the House differ in that their draftsmen tend to work more on an individual basis, except as circumstances and complications suggest the desirability of consultation and cross checking, or of a team approach, which is usually the case with the more important bills.

With a partial exception for finance bills, there is no specialisation according to subject-matter. The positive reason is that the Office must move quickly and work is speeded by assigning bills according to workload rather than by subject-matter. The negative reason is that specialisation is unnecessary because it is believed that the draftsman's main function is to know the questions rather than the answers. For the facts he can, like his Washington counterpart, go to an expert and ask questions; for the law, he does much of his own research, but in discharging his responsibility he leans heavily on the departmental lawyers familiar with the the particular subject-matter. In this way a good draftsman can turn out a professional result without previously being an expert in the particular field. (This approach rejects the view that the best person to draft a statute is the lawyer who in the first instance is the most familiar with the specific subject-matter.)

Work on a bill is not undertaken casually. Only the departments can initiate legislation draftable by the Office of the Parliamentary Counsel, and this can be done only through the minister concerned and with the approval of his fellow ministers. This consists of getting the approval of (1) the appropriate policy committees of the cabinet and (2) the programming committee.

The minute of the programming committee constitutes the departmental credential for the proposed bill. This is subject to the usually *pro forma* approval by the Treasury, a carry-over from the time when there was no adequate programming committee. The final step is for the legal adviser to the department concerned to prepare departmental instructions, addressed to the Parliamentary Counsel and specifying in particular what the proposed legislation is intended to embody. A good departmental instruction will be comprehensive and will frequently refer to relevant statutes and court cases. The Parliamentary Counsel discourages instruments couched in the form of proposed statutes on the ground that the inexperienced authors of such attempts usually succeed in obscuring their specific objectives instead of being helpful to the draftsman.

The system just described is further reason for the greater productivity of London draftsmen and it is in refreshing contrast to the slipshod habits in Washington, where even the sophisticated draftsmen of the Senate and House have not adequately coped with the prevalent tendency to rush into "legal language" each tentative expression of uncrystallised policy.

In Washington the Congressional committee practice of considering only full-blown bills, a very large proportion of which originate in the executive agencies as expressions of proposed (and thus tentative) policy, means that much of the initial drafting work must later be redone. With executive powers constitutionally separated from legislative powers, this is unavoidable. Moreover, a committee's policy changes are usually reflected in concurrent drafting changes made under conditions that handicap even the expert draftsman. Finally, once a committee has concluded its policy deliberations, the bill's sponsors are strongly tempted to push for immediate floor consideration. Meanwhile, any thoroughgoing attempt to solve the remaining drafting problems is likely to stumble over the belief that the committee's policy decisions have somehow sanctified the specific wording in which those decisions happened, in the confinement of formal deliberation, to have been expressed. As a result, what started out as an adequately drafted bill may end up as crude patchwork.

Some of this could be avoided if Congressional committees ceased definitive redrafting as they changed policy and, especially, if they took fuller account of the fact that, although it is comparatively easy to change the plan of a building at the blueprint stage, it is hard to change it once the building is largely completed. Thus, they might well concentrate more on substantive policy and leave the perfecting language changes to their draftsmen, to be carried out uninhibited by the exigencies of formal committee deliberation.

In the composition of statutes, the Office of the Parliamentary Counsel exercises a high degree of independence and the client makes little attempt to intrude into matters of technique and form. Suggestions relating to these matters are politely received, but the Office exercises its own best judgment. At the same time the draftsmen are sophisticated enough to recognise situations in which important political considerations require concessions in form and approach. In this respect there appears to be no significant difference in the initial drafting of bills between the Office of the Parliamentary Counsel and the Offices of the Legislative Counsel of the House and Senate. However, after the bill reaches the committee stage, where in Washington significant changes are more likely to be made, the draftsman has less of a free hand.

One matter of Parliamentary procedure, incidentally, has had a mild effect on the form that extended bills would otherwise take. The Committees' practice of approving bills section-by-section, beginning at the beginning, has affected the arrangement of bills by causing (1) the introductory sections to be limited to general principles, with detailed qualifications deferred for development in later sections, and (2) the definitions to be placed at the end, instead of at the beginning, as is usually done in American bills.

Although the Office of the Parliamentary Counsel remains an arm of the executive branch for the purpose of serving that branch, it frequently advises the clerks of the standing committees on the supposed meaning of amendments proposed to be made in bills already introduced and under consideration by Parliament. Although in this role the draftsman acts as independent adviser on the bill, he is in a relationship of complete trust with the clerk, who is not a lawyer. His advice is frank and it includes technical matters, such as points of order, that in Washington would be handled by the Parliamentarian (Parliament has no such officer).

It is interesting also to compare the handling of what are known in the United States as "codification" bills and in England as "consolidation" bills, that is, unified restatements of existing statutory law. In Washington, codification bills are prepared under the sponsorship of the Law Revision Subcommittee of the Committee on the Judiciary of the House of Representatives. In most instances they are farmed out to particular executive agencies or to private publishing concerns, and when introduced they have a standing no different from that of any other kind of bill. In England, all consolidation bills are prepared by a consolidation branch set up within the Office of the Parliamentary Counsel and consisting, at the present time, of three lawyers, two of whom are drawn on an approximately two-year rotating basis from the

personnel of the Office as a whole. The third lawyer is permanently assigned to this work. The separate branch was set up in 1947 to keep the non-consolidation bills from pre-empting the field.

Consolidation bills are immune from substantive amendment, because under Parliament's rules of relevance such an amendment is not germane to the subject matter of a bill whose only object is to restate existing law. The Consolidation of Enactments (Procedure) Act, 1949, extends this immunity to consolidation bills that contain some small departures from the substance of existing law, provided the departure is not substantial. Thus, standardisation of minor aspects of procedure does not take such a bill out of the protected class.

A closely related kind of bill is the bill "To consolidate with amendments. . . ." This approach is used in those cases where the text of existing law is badly cluttered with inconsistencies and irrationalities resulting from successive layers of legislation. Briefly, it consists of a start-from-scratch attempt to restate what is believed to be the substance of existing law, without attempting to account for each provision of current text. Such bills normally contain some substantive changes. Not enjoying a privileged status, they are subject to amendment like any other bill. Recent examples include the Customs and Excise Act, 1952, and the Army Act, 1955.

Delegated (or "subordinate") legislation, on the other hand, is normally drafted by government lawyers assigned to the agency concerned. (Only that of exceptional importance is drafted by the Office of the Parliamentary Counsel.) In the Ministry of Transport and Civil Aviation, for example, delegated legislation is handled by the Principal Legal Adviser and a staff of seven lawyers who, though they are employed by the Treasury, are assigned to serve the legal needs of the Ministry of Transport and Civil Aviation. The problem of diversity is minimised (1) by the small size of the total legal staff, all of whom spend a considerable part of their time drafting, and (2) by the fact that all important regulations clear through one person, the Principal Legal Adviser, who in the case of the current incumbent happens to be a graduate of the Office of the Parliamentary Counsel.

The significant differences between legislative drafting in London and that in Washington do not lie in any differences between the methods and skills of the Office of the Parliamentary Counsel and those of the Offices of the Legislative Counsel of the House and Senate, for which the similarities are more striking than the differences. They lie, instead, in the fact that in Washington proposed legislation is much more vulnerable to redrafting, under

conditions that are not always favourable to the practice of the drafting art, and in the fact that the greater bulk of legislative drafting is done outside those Offices and in many instances by persons of more modest experience and skill. Whereas in London the typical bill is drafted by a full-time professional, in Washington it is drafted by an inexperienced lawyer, a heterogeneous *ad hoc* committee, or a partly experienced lawyer whose drafting duties are a mere incident to his other duties. Contributing to this situation is the popular assumption that a law school diploma carries with it full competence to draft any legal document, including the most complicated and sensitive legislation. That this assumption has not been supported by the results does not appear to have caused widespread concern.

Equally important is the fact that in Washington legislative drafting is done by a far larger number of draftsmen. Even among draftsmen of uniform ability the dissipation of the general chore of drafting legislation among a large number of lawyer groups reflecting different governmental attitudes and approaches, some of whom are subject to rapid turnover, is inevitably reflected in the legislative results. Certainly the most fertile single source of confused, difficult-to-read, overlapping, and conflicting statutes is the lack of uniformity in approach, terminology, and style. The ravages of heterogeneous authorship appear to be large in Washington and small in London. Nor is there a presently available solution in Washington, in the absence of any effective screening of legislation generally.

Such screening is not provided by any agency of Congress, except with respect to " codification " (consolidation) bills, all of which funnel through the House Judiciary Committee. Nor is it provided by the executive branch except as a particular agency may achieve a degree of uniformity with respect to specific statutes within its own limited orbit. Viewed broadly, the Tower-of-Babel problem is much greater in Washington than it is in London and it has been dealt with less successfully. Unless there is a major reorganisation of the Congressional drafting services, the only effective control of uniformity problems rests with individual executive agencies (which initiate the bulk of the legislation that affects their operations), working in close conjunction with the appropriate committee staffs. In the smaller agencies, with their smaller legal staffs, the problem of heterogeneous authorship may not appear to be marked, but in such sizeable agencies as the Department of Defense it remains a significant and baffling problem.

COLLATERAL CONTRACTS

K. W. Wedderburn

"It is evident both on principle and on authority," said Lord Moulton in 1913[1]:

> "that there may be a contract the consideration for which is the making of some other contract. 'If you will make such and such a contract I will give you one hundred pounds,' is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract. But such collateral contracts must from their very nature be rare."

The frequency with which such "collateral contracts" make their appearance, however, depends upon the extent to which the courts are willing to spell them out of a situation where this is a possible, but not a necessary analysis. Their increasing tendency to favour such a view in cases where justice is promoted by so doing, gives added importance to the "collateral contract." In 1958 the analysis was used in two interesting cases,[2] and the time is ripe for a review of the doctrine. This is particularly required because of the view taken by some leading authorities on the law of contract. Referring to Lord Moulton's speech, for example, Cheshire and Fifoot comment: "it has been asked if proof may be given of a 'collateral' agreement or warranty entered into before or contemporaneously with the main contract and for which it forms part of the consideration. Such technicalities seem superfluous and are certainly not helpful"; and they go on later to suggest that this part of Lord Moulton's speech is

> "impaired by the unhappy suggestion that the oral evidence offered seeks to establish a second agreement which varies or contradicts the effect of the written contract; whereas the party proferring the evidence is attempting rather to show that the writing contains only a portion of the contract in issue."[3]

[1] *Heilbut Symons & Co.* v. *Buckleton* [1913] A.C. 30 at p. 47.

[2] *City and Westminster Properties (1934), Ltd.* v. *Mudd* [1958] 3 W.L.R. 312; and *Mouat* v. *Betts Motors, Ltd.* [1959] A.C. 71 (J.C.).

[3] *Law of Contract* (4th ed. 1956), p. 100. Pollock on *Contract* (Winfield's 13th ed.), p. 202 agrees that whether there are two contracts or one is "a nice question but not material to the result." Other textbooks, in effect, agree either by ignoring the collateral contract together, (*e.g.*, Wilson, *Law of Contract*,

The rejection of the "collateral" oral contract as necessarily a "technicality" is a startling reminder that this is a concept foreign to some commentators and judges. Is there any justification for using the "two-contract" analysis? Before that question can be answered, we must turn attention to the "parol evidence rule."

The Parol Evidence Rule

Cheshire and Fifoot, in the passage quoted, were discussing the vexed problem of written contracts to which one party wishes to annex an orally agreed obligation; and it is mainly, although not exclusively, in the context of such situations that the "collateral contract" analysis has made its appearance. Indeed, for the purposes of this article, we may take as our typical situation that in which a court has before it a document which appears to embody the contractual terms agreed between two parties, and one party now alleges that a further oral agreement was made before, or contemporaneously with, the document [4] and tries to enforce the oral promise made to him. Should the court admit evidence of the oral agreement?

At first sight, the so-called "parol evidence" rule clearly answers that question in the negative. The courts have stressed the "absolute necessity" of adhering to the "rule of law—and a salutary rule of law which prevented great inconvenience and troublesome litigation in many instances—that a written contract cannot be varied or modified by word of mouth" [5]; and have upheld the "firmly established . . . rule of law that parol evidence cannot be admitted to add to, vary or contradict a deed or other written instrument." [6]

There are, however, many situations in which it is also well established that parol evidence will be admitted, in spite of this rule. With most of these we are *not* concerned. For example, the courts will receive parol evidence (1) to interpret or "translate" the meaning of words used in the document in some circumstances,

p. 238), or by failing to distinguish it clearly from a "one-contract" analysis: Cockle, *Cases and Statutes on Evidence* (9th ed.), p. 338; Chitty on *Contract* (21st ed.), pp. 174, 181 (but see p. 131); Benjamin on *Sale* (8th ed.), pp. 671–672; Smith & Thomas, *Casebook on Contract*, Chap. 10. Supporters of the collateral contract are: Salmond & Williams on *Contracts*, pp. 151 *et seq*; p. 177; Sutton & Shannon, *Contracts* (5th ed.), Art. 19; Anson, *Law of Contract* (20th ed.), p. 295; Williams, *Statute of Frauds s. IV*, Part III, Chap. III; and (perhaps) Odgers, *Construction of Deeds and Statutes* (4th ed.), pp. 72 *et seq*.

4 This article is not concerned with *subsequent* variations or agreements.

5 *Mercantile Agency Co., Ltd.* v. *Flitwick Chalybeate Co.* (1897) 14 T.L.R. 90, *per* Lord Halsbury L.C. (H.L.).

6 P. O. Lawrence J. in *Jacobs* v. *Batavia & General Plantations Trust* [1924] 1 Ch. 287, p. 295; (affd. C.A. [1924] 2 Ch. 329).

e.g., in the face of latent ambiguities [7]; (2) to prove terms which must be implied into the agreement, *e.g.*, by custom or trade usage, where the parties meant "to contract with reference to those known usages" [8]; (3) to show that the document should be rectified because the terms previously agreed upon by both parties, which they intended to reduce to writing, are not accurately recorded in it [9]; (4) to show that the document was not intended to operate as a contract at all [10]; or not intended to operate unless a contingent condition precedent to the bargain has been satisfied: *e.g.*, a contract of sale between A and B which is to operate only if X gives his approval.[11] None of these questions fall within the scope of this paper, though the last should not be wholly forgotten.[12] An oral "condition" precedent of that kind will, if unfulfilled, prevent the birth of contractual obligations altogether. But unless the parties' intention is inescapably clear in this direction, the courts do not often adopt that interpretation of an oral stipulation which nullifies the whole transaction.[13]

More serious for our purposes is another limitation upon the parol evidence rule, one which causes the rule to be no more than a self-evident tautology. The rule applies only if the document is intended to be the whole contract. If, therefore, the parties intended to make a contract partly oral and partly written, there is no objection to parol evidence being introduced to prove the oral terms, unless statute intervenes. Thus, the "rule" comes to this: when the writing is the whole contract, the parties are bound by it and parol evidence is excluded; when it is not, evidence of the other terms must be admitted! To say this is to say little more than that the parties are bound, as usual, by the terms which, from an

[7] *e.g.*, *Bank of New Zealand* v. *Simpson* [1900] A.C. 182. See further Chitty on *Contract* (21st ed.), p. 174; Phipson on *Evidence* (9th ed.), Chap. XLVII; and Odgers, *Construction of Deeds and Statutes* (4th ed.), pp. 31, 53, 72 *et seq.*

[8] *Hutton* v. *Warren* (1836) 1 M. & W. 466, 475 (Parke B.).

[9] If the writing expresses exactly what the parties desired to express, it cannot be rectified even if they were both mistaken as to the fundamental meaning: *Rose (Frederick E.) Ltd.* v. *Pim (William H.) Ltd.* [1953] 2 Q.B. 450. See also *infra*, p. 63.

[10] See *Bank of Australia* v. *Palmer* [1897] A.C. 540; *Jervis* v. *Berridge* (1873) L.R. 8 Ch. 351.

[11] *Pym* v. *Campbell* (1856) 6 E. & B. 370; *Pattle* v. *Hornibrook* [1897] 1 Ch. 25; *New London Credit Syndicate, Ltd.* v. *Neale* [1898] 2 Q.B. 487; *Kuenigl* v. *Donnersmarck* [1955] 1 Q.B. 515. "It is in analogy with the delivery of a deed as an escrow; it neither varies nor contradicts the writing but suspends the commencement of the obligation": *Wallis* v. *Littell* (1861) 11 C.B.(N.S.) 369 at p. 375.

[12] Note, too, the use of parol evidence to ascertain the objective "intention" of the parties, "identify" the subject-matter, and so control the implication of contingent "conditions" *subsequent*: *Krell* v. *Henry* [1903] 2 K.B. 740.

[13] See for example *Trans Trust S.P.R.L.* v. *Danubian Trading Co., Ltd.* [1952] 2 Q.B. 297 (Denning L.J. at p. 304). The "contingency" interpretation would have been possible in many of the "collateral warranty" cases discussed below.

objective point of view, were "intended" by them to be contractually binding [14]; and the peculiar difficulties introduced by the *writing* have been conjured away. If that is correct, it is very easy to conclude, that the only question to be asked in such a case is: "Did the parties intend to set their oral stipulation side by side with the written document so as to make each an essential part of the bargain or was the written document the sole repository of the contract?" [15]

The Evasion of the Parol Evidence Rule

At first sight that conclusion seems inescapable, for the curious thing about the parol evidence rule is that throughout, certainly, the nineteenth and twentieth centuries it has amounted to no more than this. In case after case, the courts have stressed that no oral terms could be added to the written terms in which the parties had expressed their contract. The contract to sell "Ware" potatoes cannot by parol evidence be turned into one to sell "Regent's Wares" [16]; the written contract made after a sale by auction cannot be varied by reference to statements made by the auctioneer before the sale [17]; an oral agreement by the landlord to take rent in arrear cannot be admitted to vary a lease under which rent is payable in advance [18]; alleged previous oral agreements cannot be admitted to add to the terms of written arrangements for the sale of a business [19] or dissolution of a partnership.[20] Yet, over the same period, in case after case, the courts have insisted that the rule "only applies where the parties to an agreement reduce it to writing and agree or intend that that writing shall be their agreement." [21] Where there are merely "writings out of which with other things a contract is to be made" [22]; where the parties intended a previous informal agreement to survive a deed [23]; where

[14] See the discussion in *Oscar Chess, Ltd.* v. *Williams* [1957] 1 W.L.R. 370 (C.A.).
[15] Cheshire & Fifoot, *op. cit.*, p. 100.
[16] *Smith* v. *Jeffryes* (1846) 15 M. & W. 561; and see *Harnor* v. *Groves* (1855) 15 C.B. 667. *Quaere* whether Williams is correct in suggesting that in this case, and others like *Giraud* v. *Richmond* (1846) 2 C.B. 835, the Statute of Frauds excludes oral evidence *independently* of the common law rule (*The Statute of Frauds s. IV*, p. 150).
[17] *Powell* v. *Edmunds* (1810) 12 East 6; *Shelton* v. *Livius* (1832) 2 Cr. & J. 411.
[18] *Henderson* v. *Arthur* [1907] 1 K.B. 10. See too *Longman* v. *Blount* (1896) 12 T.L.R. 520.
[19] *Hutton* v. *Watling* [1948] Ch. 398.
[20] *Leggott* v. *Barrett* (1880) 15 Ch.D. 306.
[21] *Harris* v. *Rickett* (1859) 4 H. & N. 1, p. 7, *per* Pollock C.B.; and see *Stones* v. *Dowler* (1860) 29 L.J.Ex. 122.
[22] *Lockett* v. *Nicklin* (1848) 2 Ex. 93, 100 *per* Alderson B.; *Allen* v. *Pink* (1838) 4 M. & W. 120; *Beckett* v. *Nurse* [1948] 1 K.B. 535.
[23] *Palmer* v. *Johnson* (1884) 13 Q.B.D. 351 (especially Bowen L.J. at p. 357).

a charterparty [24] or bill of lading [25] represented only a part of the whole agreement; where on a sale of a house the written contract did not contain an oral warranty previously given by the vendor builder [26]; where, according to the written terms of carriage, goods were to be carried to station X but the parties had orally agreed upon carriage to a more distant destination [27]—in such cases the parol evidence has been admitted. These decisions, and many others, go far beyond the limited proposition, long established, that parol evidence could be admitted to prove the consideration, or to supplement a nominal consideration apparent in a deed or other document.[28] Indeed, the "consideration" cases are now no more than easily understood illustrations of a general principle that the "rule excluding parol evidence only applies when the parties set down in writing the terms agreed." [29]

What the parol evidence rule has bequeathed to the modern law is a presumption—namely that a document which *looks* like a contract is to be treated as the *whole* contract. This presumption is "very strong," but "it is a presumption only, and it is open to either of the parties to allege that there was, in addition to what appears in the written agreement, an antecedent express stipulation not intended by the parties to be excluded, but intended to continue in force with the express written agreement." [30]

As Denning L.J. said recently, "There have been many cases [31] where the courts have found an oral warranty collateral to a written contract." [32] There have indeed; and in some of them it is surprising that the presumption of completeness was sufficiently rebutted to let in the further oral terms.[33] Furthermore, it is clear

[24] *Hassan* v. *Runciman & Co.* (1905) 91 L.T. 808.
[25] *Ardennes S.S.* (*Cargo Owners*) v. *Ardennes S.S.* (*Owners*) [1951] 1 K.B. 55.
[26] *Otto* v. *Bolton* [1936] 2 K.B. 46, 50, 51; *Miller* v. *Cannon Hill Estates, Ltd.* [1931] 2 K.B. 113, 118; *Collins* v. *Hopkins* [1923] 2 K.B. 617, p. 629 (furnished tenancy).
[27] *Malpas* v. *L. & S. W. Ry.* (1866) L.R. 1 C.P. 336.
[28] *Abbott* v. *Hendricks* (1840) 1 M. & G. 791. *Townend* v. *Toker* (1866) 1 Ch. 446; see too Halsbury, *Laws of England* (3rd ed.) Vol. 11, pp. 403–404.
[29] Denning L.J. in *Turner* v. *Forwood* [1951] 1 All E.R. 746, at p. 749. (Consideration stated in writing to be 10s. Real consideration of £1,250 could be proved.) The more explicitly the consideration is set out in the document, the more difficult is it to persuade the court that additions should be made: *Barton* v. *Bank of N.S.W.* (1890) 15 App.Cas. 379, 381, *per* Lord Watson. No oral addition will be allowed to *contradict* the consideration clearly expressed in the document: *Ridout* v. *Bristow* (1830) 1 C. & J. 231. On contradicting the writing see *infra*, p. 81.
[30] Lord Russell of Killowen C.J. in *Gillespie Bros.* v. *Cheney, Eggar & Co.* [1896] 2 Q.B. 59, p. 62. See, too, *Newman* v. *Gatti* (1907) 24 T.L.R. 18, 20 (Vaughan Williams L.J.); *Palmer* v. *Johnson* (1884) 13 Q.B.D. 351, 357 (Bowen L.J.).
[31] Citing *Birch* v. *Paramount Estates, Ltd.* (1956) 16 *Estates Gazette* 396 (house to be as good as the show house).
[32] *Oscar Chess, Ltd.* v. *Williams* [1957] 1 W.L.R. 370, p. 376.
[33] *Malpas* v. *L. & S. W. Ry.* (1866) L.R. 1 C.P. 336: Compare cases like *Evans* v. *Roe* (1878) L.R. 7 C.P. 138.

that once a party breaks through the barrier of the presumption he may be able to persuade the court that the contract is to be found in more than two places, *e.g.*, in the document plus other writings (such as correspondence), plus oral statements, all taken together.[34] The parol evidence presumption, then, rests upon no special rule of evidence as has sometimes been suggested.[35] It rests upon the " very obvious reason " that to admit parol evidence if the parties have reduced their whole contract to writing would be contrary to their own intention.[36] But their intention must likewise prevail if they appeared to intend a *composite* contract, part written, part oral. In such a case, it is to be noticed that there are three analyses, each possible and each different, but each productive of the same result: the collateral term; the collateral contract (to which we come later); and a " mistake " which gives rise to the remedy of rectification. The first and third are both " one-contract " analyses; but they differ in that the first assumes in the parties an intention to make a composite contract; whereas the third means that they intended the contract to be found wholly in the written terms, but the document in its present form does not accurately represent their agreement. Both, however, lead to the same conclusion—that the parol evidence which one party desires to introduce is admissible; whereas if the writing is taken to be exclusive the parol evidence is for ever shut out.[37] Since this is the decision which matters, it is not surprising that the courts, in some cases, have not found it necessary to decide which of these two analyses to adopt.[38] Though it is not strictly logical to do so, the really important question can be decided without distinguishing between them.

What matters even more is that the presumption does not seem to be as strong today as it once was. The cases of *Hutton* v.

[34] *Stucley* v. *Bailey* (1862) 1 H. & C. 405. *Cf. Jervis* v. *Berridge* (1873) L.R. 8 Ch. 351.

[35] See, *e.g.*, *Guardhouse* v. *Blackburn* (1866) 1 P. & D. 109, 117: " The general rule . . . is based on the proposition that written testimony is of a higher grade—more certain, more reliable—than parol, and that resort should be had to the highest evidence of which a subject is capable to the exclusion of the inferior class." Compare *Meres* v. *Ansell* (1771) 3 Wils.K.B. 275, 276. If a *statute* demands writing, the reason for the demand will depend upon the particular statute.

[36] Bramwell B. in *Wake* v. *Harrop* (1862) 30 L.J.Ex. 273, p. 277 (affd. 31 L.J.Ex. 451); *Inglis* v. *Buttery* (1878) L.R. 3 App.Cas. 552, 577 *per* Lord Blackburn.

[37] *Cf. Bradford* v. *Romney* (1862) 30 Beav. 431.

[38] *Henman* v. *Berliner* [1918] 2 K.B. 236, 239, 240; *Walker Property, Ltd.* v. *Walker* (1947) 171 L.T. 204 (C.A.: the judgments appear to include all three analyses since Evershed L.J. seems to use the collateral *contract*—of which he may be said to be the leading modern judicial exponent. See his judgments in *Routledge* v. *McKay* [1954] 1 W.L.R. 615; *Mahon* v. *Ainscough* [1952] 1 All E.R. 337; *Webster* v. *Higgin* [1948] 2 All E.R. 127).

Watling[39] and *Beckett* v. *Nurse*[40] illustrate the current position. In the first, the plaintiff sought to exercise an option to purchase property contained in a document expressing the terms of a sale of a business and goodwill; the defendant tried to set up an oral agreement. The Court of Appeal in rejecting the defendant's contention paid great attention to the form of the document. It was signed over a stamp; it looked like a complete contract; and a reasonable purchaser would certainly think that it was meant to express the whole agreement.[41] To such a document the parties cannot have intended to add oral terms. In *Beckett* v. *Nurse* the document included a receipt for the purchase price of a field signed by the defendant over a stamp, a description of it, and a sketch plan. The defendant alleged that there was a further oral agreement to the effect that the plaintiff should build a bungalow and live in it on the land. The Court of Appeal held that the document did not contain the whole contract, and that the parol evidence was admissible, even though it might then have the effect of making the composite contract unenforceable by action[42]; this document did not sufficiently appear to be a comprehensive account of the whole agreement. These cases show that each particular document must be closely construed. The strength of the presumption against parol evidence will depend upon the exact nature of the written agreement and its surrounding circumstances.

The Collateral Contract Cases[43]

In such a development, where do the collateral contract cases fit in? Until 1864, very little is heard of this particular device.[44] In that year, in *Lindley* v. *Lacey*,[45] the plaintiff had been induced to sign a written contract for the sale of goods, fixtures and goodwill by the defendant's oral promise to settle an action brought against the plaintiff by C., holder of a bill accepted by him. The court enforced the promise as an agreement "totally collateral and distinct from the agreement for the sale of the goods and the transfer

[39] [1948] Ch. 398.
[40] [1948] 1 K.B. 535.
[41] Lord Greene M.R. [1948] Ch. p. 403.
[42] Because there would be no memorandum sufficient to satisfy s. 40, Law of Property Act, 1925. See further *infra*, p. 71. Their Lordships' obvious reluctance to decide the case in the way it was decided shows how weak the presumption has become. Compare the stronger emphasis of Bramwell B. in *Rogers* v. *Hadley* (1863) 2 H. & C. 227, p. 249.
[43] See particularly Williams *Statute of Frauds s. IV*, Part III, Chap. III.
[44] There are cases in which the courts separated a transaction into two contracts. But they adumbrate the later cases only lightly. See *Green* v. *Saddington* (1857) 7 E. & B. 503; *Mayfield* v. *Wadsley* (1824) 3 B. & C. 357. See too the cases on "severance," *infra*, p. 73.
[45] (1864) 17 C.B.(N.S.) 578; 34 L.J.C.P. 7.

of the possession of the premises." It was "as if there was a written agreement ready to be signed and that one of the parties said to the other: 'If you will put your name to that, I will do so and so.'"[46]

Then in *Morgan* v. *Griffith*[47] and *Erskine* v. *Adeane*,[48] oral promises on the part of landlords to keep down rabbits were enforced as collateral contractual promises in return for which the tenant had executed the written lease. In the latter, Mellish L.J. in a much quoted passage, accepted the rule that a bargain reduced to writing could not be supplemented by verbal evidence. He added:

> "but, nevertheless, what is called a collateral agreement, where the parties have entered into an agreement for a lease or for any other deed under seal, may be made in consideration of one of the parties executing that deed, unless, of course, the stipulation contradicts the terms of the deed itself."[49]

In *Angell* v. *Duke*[50] a landlord's promise to send in furniture was said to be enforceable in a similar manner; it had induced the tenant to contract for a lease. As in *Lindley* v. *Lacey*, one reason in this case for presenting the promise as a separate contract was to avoid problems otherwise raised by the Statute of Frauds. If the contract was collateral, then, not being concerned with any matter caught by the Statute, the orality of its executory promise was no defect. So much was decided on demurrer. But when *Angell* v. *Duke* came to trial,[51] Blackburn J. refused to allow the parol evidence; and on appeal he was joined in upholding this decision by two judges who had earlier assented to the introduction of the evidence.[52] In the second round, the plaintiff had not sufficiently convinced the court that the promise was in fact made in such a serious manner that it could be taken to be a contractual promise at all.[53] On demurrer the court was concerned with whether the

[46] (1864) 17 C.B.(N.S.) p. 585; 34 L.J.C.P. p. 9 (Erle C.J.). Most of the cases cited did not involve collateral *contracts*, *e.g.*, *Harris* v. *Rickett* (1859) 4 H. & N. 1; and *Wallis* v. *Littell* (1861) 11 C.B.(N.S.) 369.

[47] (1871) L.R. 6 Ex. 70.

[48] (1873) L.R. 8 Ch. 756.

[49] *Ibid.*, p. 766.

[50] On demurrer: (1875) L.R. 10 Q.B. 174. (Cockburn C.J., Mellor, Lush and Archibald JJ.)

[51] (1875) 32 L.T. 320.

[52] Cockburn C.J. and Mellor J. It is sometimes suggested that there is a distinction between the two decisions, *i.e.*, that they show that what is "collateral" and acceptable for the purposes of the statute may not be "evidentially" collateral and admissible: see Phipson on *Evidence* (9th ed.), p. 619. It is suggested that this is not so. In the second decision, Blackburn J. himself expressly approves *Morgan* v. *Griffith* (*supra*).

[53] See *infra*, p. 77. The judges also paraded the banner of the parol evidence rule as though it meant what it said; and, furthermore, they now took the view that the writing was "contradicted" by the collateral promise.

oral agreement could possibly be admitted (which it could if it were a collateral contract).

Six years later the Court of Appeal decided *De Lasalle* v. *Guildford*.[54] There, the tenant had refused to hand over his counterpart of a lease until he received the landlord's assurance—("I give you my word")—that the drains were in good order. His action for damages for injury suffered by reason of their defective condition succeeded in the Court of Appeal, the decision of Bruce J. that no oral warranty could be admitted being reversed. The previous collateral contract cases were cited with approval; and the court declared that "the present contract or warranty by the defendant was entirely independent of what was to happen during the tenancy." The trouble with the case, from our point of view, is that the court in places used language which is more appropriate to a "one-contract" than to a "two-contract" analysis. The lease "did not cover the whole ground" and "did not contain the whole of the contract."[55] The reason for the ambiguity lies in the phrase "collateral warranty."[56] Now a warranty is always "collateral" in the sense that it is "though part of the contract, yet collateral to the express object of it."[57] But such an undertaking may or may not be "collateral" in the sense that it forms the obligation of a second contract distinct from the written agreement. All warranties are collateral, but some are more collateral than others. A "warranty" is at its most collateral when it becomes a "collateral contract."

The failure to observe the tautological nature of the parol evidence rule and to distinguish between the analyses of collateral term and collateral contract—(a failure usually occasioned by the fact that either analysis would equally well provide the answer desired by the court)—caused some judges great difficulty. The best example is the judgment of Bruce J. in *Lloyd (Edward) Ltd.*

[54] [1901] 2 K.B. 215.

[55] *Ibid.*, p. 222, A. L. Smith M.R. This and other passages of his judgment (especially p. 221) suggest "one contract." But it will be suggested that this is not the most elegant explanation, nor that intended by the court. In particular, it is easier to say that the C.A. intended a "two-contract" analysis if their judgment is read together with that of Bruce J., which they were reversing: see (1901) 84 L.T. 549.

[56] This is a favourite phrase in all the collateral contract cases. "Warranty," it is suggested, is used in most of them in the old sense of "contractually binding guarantee," and not in the modern sense of "term of the contract which is not a condition."

[57] Lord Abinger, *Chanter* v. *Hopkins* (1838) 4 M. & W. 399, p. 404. See too Sale of Goods Act, 1893, s. 62 ("an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract"); also Stoljar, *Conditions, Warranties and Descriptions* (1952) 15 M.L.R. 425, where he advances nine "meanings" of collateral warranty at p. 430.

v. *Sturgeon Falls Pulp Co., Ltd.*[58] His Lordship, who had just been reversed in *De Lasalle* v. *Guildford*,[59] was one of the exponents of a severe parol evidence rule. As we have seen, judges had frequently accepted the two things which he disliked: (1) oral terms (including warranties) which, if the presumption could be rebutted, stood side by side with a document to make up one composite contract; and (2) oral promises or guarantees ("warranties") standing as separate contracts, for which the consideration was no more than entering into a main, written contract. Other judges, too, put up a fight against an extension of these notions [60]; but usually, in the cases decided at the turn of the century, the problem was avoided by a decision that the alleged promise was not contractual in nature, *i.e.*, not "intended" to be binding.[61] In nearly all the modern cases that point of fact has been more prominently disputed than any question of law. But this does not explain the absence, in many of the cases discussed, of an attempt on the court's part to distinguish between the two analyses. Sometimes it is implied that they are the same thing.[62] Sometimes the language used seems to suggest that proof of a "collateral" oral warranty always necessitates proof of a collateral contract.[63] Sometimes two different judges in the same case seem to refer to "collateral warranty" in different senses, the one apparently thinking of a "two-contract," the other of a "one-contract" analysis.[64]

[58] (1901) 85 L.T. 162 (Div.Ct.), pp. 165–166. The whole of this passage (too long to quote here) is worth reading as an example of the understandable confusion caused by the different lines of authority. The collateral contract cases had been inappropriately cited to him in a case where there was only one contract; and he found them "difficult to reconcile with the older cases" such as *Kain* v. *Old* (1824) 2 B. & C. 627.

[59] [1901] 2 K.B. 215.

[60] *e.g.*, Wills J. in *Kennard* v. *Ashman* (1894) 10 T.L.R. 213: "The cases as to collateral agreements had gone quite far enough and he was not disposed to carry the doctrine further than it had already gone" (p. 214).

[61] Especially in the cases where landlords had made oral statements to tenants taking a written lease: *Green* v. *Symons* (1897) 13 T.L.R. 301 (C.A.); *Kennard* v. *Ashman* (1894) 10 T.L.R. 213; *Best* v. *Edwards* (1896) 60 J.P. 9; *Burstal* v. *Bianchi* (1892) 65 L.T. 678. And see *Grimston* v. *Cunningham* [1894] 1 Q.B. 125; *Newman* v. *Gatti* (1907) 24 T.L.R. 18.

[62] As perhaps in *De Lasalle* v. *Guildford* [1901] 2 K.B. 215. And see Somervell L.J. in *Walker (Co.) Ltd.* v. *Walker* (1947) 177 L.T. at p. 206, who bases a "collateral term" analysis upon *Erskine* v. *Adeane*. For a curious analysis see Odgers, *Construction of Deeds and Statutes*, p. 78, where the author presents together under the same heading "collateral agreements" and the frustration cases!

[63] *e.g.*, *Routledge* v. *McKay* [1954] 1 W.L.R. 615 (Evershed M.R., pp. 620, 622); *Mahon* v. *Ainscough* [1952] 1 All E.R. 337 (C.A.) (vendor's innocent representation that property had not suffered war damage not a warranty). Evershed M.R.: "no hint . . . of there having been any intention to make such a separate contract as a warranty must necessarily import" (p. 340). See too Jenkins L.J., p. 341. Many other cases have ambiguous language: *e.g.*, *Miller* v. *Cannon Hill Estates* [1931] 2 K.B. 113.

[64] See *Oscar Chess, Ltd.* v. *Williams* [1957] 1 W.L.R. 370. Morris L.J. (dissenting at p. 381): "The plaintiffs do not allege that there was any collateral

"THREE-PARTY" COLLATERAL CONTRACTS

Before continuing, it is worth adverting to a rather different situation from that which has so far concerned us. The collateral contract is a well-known phenomenon where A gives a warranty, guarantee or promise to B in return for B making a particular contract with C. The best-known recent example is *Andrews* v. *Hopkinson*,[65] where the second-hand car dealer warranted a car—"a good little bus"—of which the steering was badly defective, and the customer, in return, bought the car on hire-purchase terms from a finance company to which the dealer sold it. The frequency of such transactions in our society must make the "three-party collateral contract situation" a common phenomenon.[66] But the common law knows of a much older example. An agent who without authority induces anyone to contract with his principal is liable in damages for "breach of warranty of authority." This doctrine is sometimes presented to students as if it were a peculiar "exception" to the rule that innocent negligent misstatements are not actionable. But, as Buckley L.J. said:

> "the true principle . . . rests, I think, not upon wrong or omission of right on the part of the agent but upon implied contract."[67]

There is an "implied contract" by the agent "that he had authority,"[68] and "the fact of entering into the transaction with the professed agent as such is good consideration for the promise."[69]

oral warranty. They submit that the statement of the defendant was not something detached from the contract but was a part of the contract." Contrast Denning L.J. (p. 376), who is concerned with "collateral warranty" in *one* contract.

[65] [1957] 1 Q.B. 229. See too *Shanklin Pier, Ltd.* v. *Detel Products, Ltd.* [1951] 2 K.B. 854, and (1959) 75 L.Q.R. 34 (J. D. Davies).

[66] It is suggested that until the terms of the hire-purchase are rendered certain, there can be no collateral contract. The latter will, therefore, usually involve an executed consideration (actual acceptance of the finance company's terms) rather than an executory consideration, since a promise to buy from the company would not relate to any particular terms (*Scammell, Ltd.* v. *Ouston* [1941] A.C. 251). It is suggested further that in these situations no collateral contract can be based on an *implied* warranty alone and that the only situation in which the collateral contract can be based upon an implied representation is where there has been a breach of the implied warranty of authority by an agent. (The conflicting decisions on this point are cited by McNair J. in *Andrews* v. *Hopkinson* (*supra*), at p. 237.)

[67] *Yonge* v. *Toynbee* [1910] 1 K.B. 215, p. 228.

[68] Lord Davey, *Starkey* v. *Bank of England* [1903] A.C. 114 at p. 119, quoting Lord Campbell in *Lewis* v. *Nicholson* (1852) 18 Q.B. 503. See too Lord Halsbury L.C., at p. 118.

[69] Willes J. in *Collen* v. *Wright* (1857) 8 E. & B. 647, 658 (the *locus classicus* of the doctrine). See too Lindley L.J. in *Firbank's Executors* v. *Humphreys* (1888) 18 Q.B.D. 54, p. 62 ("There is a representation by the directors to the contractor and consideration given by him in the shape of action by him on the faith of the promise"); and *Heskell* v. *Continental Express, Ltd.* [1950] 1 All E.R. 1033, 1042–1043 (Devlin J.).

The " three-party " cases are useful in that they illustrate collateral contracts in which A's statement to B involved nothing more than a " warranty " as to a present state of affairs.

Advantages and Consequences of " Two-Party " Collateral Contracts

It is time to return to the two-party situation and to investigate the advantages or disadvantages possessed by the collateral contract. Three matters arise for discussion.

(a) *Avoidance of the Parol Evidence Rule*

First, it is clear that a division of a transaction into (i) main written contract and (ii) collateral oral contract eases the conscience of those who believe that the parol evidence rule is a strict and meaningful prohibition. After all, the written contract is not varied, added to, or contradicted. It stays intact—quite a different answer from that which a " one-contract " analysis demands. In consequence, many judges have shown favour to the collateral contract, even in the same breath as a rigorous demonstration of the parol evidence rule.[70] Furthermore, it is less curious to think of an oral contract collateral to a *deed*, such as the lease in *De Lasalle* v. *Guildford*,[71] than to make such writings only part of a composite contract of which the other terms are oral.[72] There are other cases in which the collateral contract is the more satisfying arrangement. In *Jacobs* v. *Batavia and General Plantations Trust, Ltd.*[73] the plaintiff had taken deposit notes of the company. The notes had been issued pursuant to a prospectus. The prospectus had contained a promise of early payment in certain circumstances which had arisen; the deposit notes made no mention of this obligation. The courts have usually refused to treat prospectuses preceding issues of debentures, shares, and the like as contractual

[70] See Lord Halsbury L.C. in *Mercantile Agency Co., Ltd.* v. *Flitwick Chalybeate Co.* (1897) 14 T.L.R. 90: collateral contract cases are " not really violations of the rule."

[71] The lease in this case was to be for three years and might therefore have been made by parol: Statute of Frauds, s. 2; Real Property Act, 1845, s. 3. If a lease were for a longer period and a deed necessary in consequence (see now ss. 52 and 54, Law of Property Act, 1925), the oral agreement could not possibly take effect, it is suggested, as a collateral *term*, but only as a collateral contract. It is interesting to note that De Lasalle would have been in a much worse position if he had had only a contract for a lease with a collateral oral *term*, for, in the absence of adequate part performance, such a contract would be unenforceable: *Hawkins* v. *Price* [1947] Ch. 645.

[72] See, too, *Mahon* v. *Ainscough* [1952] 1 All E.R. 337; *City and Westminster Properties, Ltd.* v. *Mudd* [1958] 3 W.L.R. 312 (discussed *infra*); *Routledge* v. *McKay* [1954] 1 W.L.R. 615.

[73] [1924] 2 Ch. 329 (C.A.); Warrington and Sargant L.JJ.

documents.[74] But the plaintiff's action, brought to ensure that a sum sufficient to pay him would be set aside, succeeded in this case. In the High Court and in the Court of Appeal the judgments gave the two reasons upon which that success could be based: (1) the whole contract could be found only in the notes *plus* the collateral prospectus; or, alternatively, (2) the prospectus was a separate collateral contract.[75] The second argument is much more prominent on appeal. Indeed, Sargant L.J. thought that "this is as plain a case of an additional or collateral contract as it would be possible to find."[76] His Lordship and Warrington L.J. seem to prefer this way of putting the case.

In a similar fashion, the oral promise in the recent case of *City and Westminster Properties, Ltd.* v. *Mudd*,[77] could be enforced, if at all, only as a collateral contract. The defendant had been tenant of the plaintiffs' premises comprising a shop and a room, since 1941. To their knowledge, he had slept in the small back room. In the negotiations for a new lease in 1947, he had attempted to have a clause prohibiting "lodging dwelling or sleeping" struck out of the draft. The landlord agreed to drop the phrase, but insisted upon restricting the user permitted by the lease to "showrooms, workrooms and offices only." The landlord's agent orally assured the defendant that if he signed the lease in this form, the landlord would not object to his continuing to reside there. The defendant signed. The landlord now brought an action for forfeiture of the lease on the ground of breach of covenant. Harman J. managed to do justice, but only at the last minute, with the aid of the collateral contract weapon. He held: (i) The negotiations and drafts could not be used as aids to the construction of the written lease.[78] Having regard to the nature of the property, the words used in the lease clearly meant that the premises were not to be used for residence, but "for trade purposes only." There had been, therefore, a breach of covenant by the tenant.

[74] *Re Tewkesbury Gas Co.* [1911] 2 Ch. 279; *Re Chicago and N.W. Granaries Co.* [1898] 1 Ch. 263.

[75] This was, it is true, a *written* collateral contract. But it is not easy to agree with P. O. Lawrence J. ([1924] 1 Ch. at p. 296), that it could not have been admitted had it been verbal. His distinction between *Morgan* v. *Griffith* (*supra*) and what would then have been the situation is not, with respect, very convincing.

[76] [1924] 2 Ch. at p. 338.

[77] [1958] 3 W.L.R. 312.

[78] His Lordship doubted whether attention could ever be paid to words deleted in documents in view of *Inglis* v. *Buttery* (1878) 3 App.Cas. 552, 558. At any rate, "that method of construction must be confined to commercial cases where the words struck out appear on the face of the signed document" (p. 320).

(ii) The claim for rectification of the lease could not possibly succeed. There was clearly no common intention to insert in the lease any provision permitting residence.

(iii) The plaintiffs' knowledge of the breach did not amount to a complete release of the covenant on their part.[79]

(iv) No question of equitable estoppel could arise, on the lines of the "controversial issue of the *Central London Property Trust* v. *High Trees House, Ltd.* decision."[80] This was not a promise made to the tenant suspending already existing contractual rights, but "a case of a promise made to him before the execution of the lease that if he would execute it in the form put before him, the landlord would not seek to enforce against him personally the covenant" in question.[81]

(v) This promise the tenant relied upon. There was, therefore, "a clear contract acted upon by the defendant to his detriment and from which the plaintiffs cannot be allowed to resile."[82] If this decision is to be accepted,[83] it is the strongest application of the collateral contract doctrine which our courts have yet entertained.

(b) *Advantages where Main Contract is, or might be, defective*

Academic elegance is not, however, the only claim to be advanced for the collateral contract. It is a particularly important weapon where the main contract is, or would be, invalid or unenforceable. Two examples may be taken.

(i) *The Statute of Frauds, etc.*: First the main contract may be one which is required to be evidenced in writing by section 40,

[79] Each acceptance of rent waived the breach up to that time. But more must be shown before a complete release is proved. See Megarry & Wade, *op. cit.*, p. 604. Here the landlords were merely "willing to wink" at the tenant sleeping on the premises.

[80] [1947] K.B. 130.

[81] It might, of course, have been argued that the landlord's continuing willingness to "wink" at the tenant's sleeping on the premises amounted *impliedly* to a representation *after* the lease, suspending his rights: compare *Hughes* v. *Metropolitan Ry.* (1877) 2 App.Cas. 439. But such a line of reasoning would be likely to founder on the same rock as the argument that there had been a release, *i.e.*, that there was insufficient in the landlord's *conduct* to indicate a promise to suspend the covenant for the future: compare *Bird* v. *Hildage* [1948] 1 K.B. 91. As Harman J. insists, such a promise can be found only in the express promise made *before* the lease.

[82] [1958] 3 W.L.R., p. 324. His Lordship found the case of *Re Wm. Porter & Co., Ltd.* [1937] 2 All E.R. 361 "truly analogous"; but it is respectfully submitted that that was a somewhat different case.

[83] See *infra*, p. 83. Compare with cases discussed above *Marbé* v. *Geo. Edwardes, Ltd.* [1928] 1 K.B. 269, pp. 279–280 (Bankes L.J.), 289 (Lawrence L.J.), and *Routledge* v. *McKay* [1954] 1 W.L.R. 615, where the written agreement excluded the possibility of collateral terms, but was not necessarily inconsistent with a collateral contract (Evershed M.R., p. 621–622).

Law of Property Act, 1925, the Statute of Frauds, s. 4, or the Hire Purchase Act, 1938, s. 2.[84] In *Jameson* v. *Kinmell Bay Land Co., Ltd.*[85] the company selling a building plot orally promised an intending purchaser that a road would be constructed and be ready within a reasonable time. In reliance upon this the purchaser signed a written contract to purchase. The purchaser recovered damages for loss caused by the company's failure to make the road. The Court of Appeal held that the promise to do so amounted to a collateral contract, and that it was not caught by section 40. The critical point, in such a situation, is that, had the court insisted that the transaction involved *one* contract rather than *two*, it would have been unenforceable by action (in the absence of sufficient act of part performance) because the memorandum would not have contained all the material terms. Many cases such as *Beckett* v. *Nurse*[86] show that "the memorandum must disclose either by plain words or reasonable inference all the terms of the contract"[87]; and this point was expressly argued in earlier collateral contract cases.[88] This particular advantage of collateral contracts will, however, be of less importance, now that the Law Reform (Enforcement of Contracts) Act, 1954, has drastically reduced the number of contracts of which written evidence is required.[89]

(ii) *Illegality.* Of greater importance are cases in which the main contract is tainted with illegality of such a kind that not even an innocent party could sue upon it, *e.g.*, where statute prohibits

[84] As amended by the Hire Purchase Act, 1954.

[85] (1931) 47 T.L.R. 593 (C.A. affirming Div.Ct., *ibid.*, p. 410). See too *Boston* v. *Boston* [1904] 1 K.B. 124; see, too, *supra*, p. 65.

[86] [1948] 1 K.B. 535; *Walford* v. *Narin* [1948] 2 All E.R. 85; *Hawkins* v. *Price* [1947] Ch. 645 (oral agreement to give vacant possession); *Hawkesworth* v. *Turner* (1930) 46 T.L.R. 389. (Contrast *Angell* v. *Duke* (No. 1) (1875) L.R. 10 Q.B. 174, with *Mechelin* v. *Wallace* (1837) 7 A. & E. 49.) A plaintiff may waive an oral term which benefits him alone, and enforce the contract without it: *North* v. *Loomes* [1919] 1 Ch. 378. But he cannot enforce it where the term omitted from the memorandum is solely of benefit to the defendant, even if he is willing to be bound: *Burgess* v. *Cox* [1951] Ch. 383. R.E.M. in (1951) 67 L.Q.R. 299, 300, suggests that *Martin* v. *Pycroft* (1852) 2 De G. M. & G. 785 gives a different answer in the second situation; but *quaere* whether that ought not to be regarded as a case of a collateral contract (to pay a premium), which the plaintiff was compelled to observe before equity would allow him to enforce the contract, in view of what Knight Bruce L.J. says at pp. 794–795 about parol evidence. (The rest of the judgment implies, it must be admitted, a "one-contract" view.)

[87] Williams, *Statute of Frauds s. IV*, p. 58; Megarry and Wade, *Law of Real Property*, p. 516.

[88] *e.g.*, *Angell* v. *Duke* (1875) L.R. 10 Q.B. 174.

[89] Also, contracts required to be *in* writing may involve different considerations, *e.g.*, bills of exchange. See the cases mentioned *post*, p. 76; and Byles on *Bills* (21st ed.) Chap. 8. But the collateral contract may, even then, be used to support an otherwise void promise: *Heseltine* v. *Simmons* [1892] 2 Q.B. 547, 553–555 (C.A.: valid oral contract collateral to bill of sale rendered partially void under s. 8, Bills of Sale Act, 1882).

the contract altogether.[90] Here, if the legal promise which an innocent party desires to enforce can be separated into a second contract, all may be well. Tentative moves in this direction can be found in some of the cases concerned with the difficult doctrine of severance[91]; but such efforts usually break down because the consideration had never been split up by the parties, part allocated to the legal and part to the illegal promise; and the court cannot do this merely to save the plaintiff from the consequences of the illegality.[92]

But a promise made separately from the main contract can give vigilant judges a better chance. In *Strongman, Ltd.* v. *Sincock*,[93] for example, an architect contracted with builders for work on his own house. At the time, licences were required for the work,[94] and the architect promised to obtain the licences necessary for it. In fact, work was done to a value far in excess of the licences obtained, and the builders now claimed the balance of the price over and above the sum legally permitted. The main contract was wholly illegal—at any rate as far as the excess work was concerned[95]—and the innocence of the builders would not help them if they sued on that. But they had the promise of the architect. This, said the Court of Appeal, was a collateral contract,[96] and damages equivalent to the excess sum were awarded for breach of that contract. "One is not suing," said Birkett L.J., "on the original contract but on the collateral contract or warranty, so called, and is recovering the damages which arise therefrom." He added: "The number of cases of this nature which will arise will

[90] Sutton & Shannon, *Contracts* (5th ed.) Art. 92.

[91] See *Cruickshanks* v. *Rose* (1831) 1 Mood. & R. 100; and Lord Evershed M.R. in *Napier* v. *National Business Agency, Ltd.* [1951] 2 All E.R. 264, 266.

[92] In *Kearney* v. *Whitehaven Colliery Co.* [1893] 1 Q.B. 700, Lord Esher M.R. goes to unjustifiable lengths to try to split up a simple contract of employment into two. (See Marsh (1948) 64 L.Q.R. 230, p. 350 (n. 80), citing *Kenyon* v. *Darwen Cotton Manufacturing Co., Ltd.* [1936] 2 K.B. 193, 206–207. But see now *Jennings* v. *Kinder* [1959] Ch. 22, where for tax purposes a housing assistance scheme was severed from the contract of service.) Compare the similar problem which has presented itself in the frustration cases: *Denny Mott & Dickson, Ltd.* v. *Fraser, Ltd.* [1944] A.C. 265, 278–280, 283–284.

[93] [1955] 2 Q.B. 525.

[94] Under s. 56(A), Defence (General) Regulations, 1939.

[95] Compare *Clifford (Frank) Ltd.* v. *Garth* [1956] 2 All E.R. 323 (C.A.).

[96] Denning L.J. [1955] 2 Q.B. at pp. 534–535, citing Lord Moulton in *Heilbut Symons & Co.* v. *Buckleton (supra)*: "It is said that if damages could be recovered it could be an easy way of getting round the law about illegality. That does not alarm me at all." His Lordship places emphasis upon the fact that the builders had not been negligent in accepting the assurance of the defendant because architects customarily provide the licences for work to be done. The agreement of Birkett and Romer L.JJ. with the judgment of Denning L.J. means that, in illegality cases, the collateral contract can operate only where it is *reasonable* for the representee to rely upon the promise.

not be many."[97] This is particularly true because, here, the breach of collateral contract was the cause of the illegality of the main contract. But *Strongman, Ltd.* v. *Sincock* at least shows how the collateral contract can put new weapons into the hands of judges who are determined to ensure "that in almost every case where a litigant comes without merit, the court does its very best to see that justice is done as far as possible."[98]

More recently in *Mouat* v. *Betts Motors, Ltd.*[99] the Privy Council made an analogous use of the doctrine. The appellant had paid the maximum price permitted by a New Zealand statute of 1947 for an imported car. A condition of issuing an import licence had been that the purchaser should enter into a covenant with the sellers limiting his right to resell the car within the next two years. He entered into the covenant at the same time as the sale. In breach of covenant the appellant later resold; but he contended that it was an illegal covenant because the 1947 statute defined "price" in very wide terms to include "every valuable consideration" and "any consideration which in effect relates to the sale of any goods"; the covenant, he alleged, was a valuable consideration and part of the "price" which therefore consisted in the money paid *plus* the covenant, and which therefore exceeded the permitted maximum; and the whole bargain was thus illegal. The Privy Council (*per* Lord Denning) held that the covenant did not "relate to the sale," and was legally enforceable. The "sole and entire inducement for the transfer (of property) was the cash sum," and

> "the special covenant in this case was in a sense valuable consideration—just as any collateral contract is consideration for the making of a main contract—but it did not relate to the sale. . . . It was given for the privilege of being allowed to buy a new car. . . . It was a prerequisite to the transfer of the property and not part of the consideration for it."[1]

This decision is the most extreme modern case in which what looks like one bargain has been divided into two in order to validate a promise which might otherwise be affected by illegality. Such a

[97] *Ibid.*, 539–540. The collateral promise could be said to be a guarantee of the main contract's legality. That was why the damage consequent upon the breach equalled the excess sum otherwise irrecoverable. Where the breach of a collateral contract is not the cause of illegality, which arises without the knowledge of the parties, the measure of damage would not necessarily be as great. If both parties *knew* of the illegal element, and the collateral contract was merely part of their nefarious scheme, that contract would, of course, itself become illegal.

[98] Birkett L.J., *ibid.*, p. 538. Lacking the collateral contract analysis, the Court of Appeal had been quite unable to do so in the very similar case of *Re Mahmoud & Ispahani* [1921] 2 K.B. 716.

[99] [1959] A.C. 71 (J.C.). See too *Jennings* v. *Kinder* [1959] Ch. 22.

[1] [1959] A.C. at p. 81. *Cf.* the interpretation of this case in (1959) 75 L.Q.R. 7.

partition will not be made where the collateral promise is part of one illegal scheme,[2] or in any other case where it would be contrary to public policy to enforce it.

It is not difficult to imagine other causes of invalidity in the main contract, apart from formal defects or illegality, *e.g.*, mistake, or lack of capacity—which might not affect a collateral contract. It is submitted that sufficient consideration to support the collateral promise can be found in the formation of a main contract which turns out to be unenforceable, void, or even, in some cases, illegal.

(c) *Other Features of Collateral Contract*

Lastly, the right of action to which the collateral contract gives rise is prima facie always personal as between the two parties concerned. As between them, breach of that contract may form a ground for refusing specific performance of the main contract,[3] or, as in many of the cases already mentioned, may be the basis of an action for damages.[4] But it does not normally affect third parties even if they are affected by the main contract. Thus, in cases where oral contracts have been collateral to leases, judges have sometimes been careful to insist that they could be enforced not against the "landlord *qua* landlord . . . but as giving a right of action personally" against him, so that assignees of his would not be affected.[5] Harman J. seems to indicate the same sort of thing,

[2] *Hopkins* v. *Prescott* (1847) 4 C.B. 578; and *Napier* v. *National Business Agency, Ltd.* (*supra*). It must be remembered also that the analysis cannot apply to contracts "collateral" in a different sense, *i.e.*, those arising out of or founded upon an illegal transaction. Such collateral contracts are themselves illegal and void: see, *e.g.*, *Fisher* v. *Bridges* (1854) 3 E. & B. 642 (security for balance of price of land conveyed for illegal purpose).

[3] *Henry* v. *Smith* (1895) 39 S.J. 559, p. 560, *per* Wright J.; *Morgan* v. *Griffith* (1871) L.R. 6 Ex. 70, p. 73, *per* Kelly C.B.; *Martin* v. *Pycroft* (1852) 2 De G.M. & G. 785. Equity also has its own ways of enforcing collateral promises: *e.g.*, *Bannister* v. *Bannister* [1948] 2 All E.R. 133 (C.A.: constructive trust).

[4] But, a breach of the oral contract, however fundamental it may be to the bargain, will presumably not give the promisee a right to *repudiate* the main contract (although, as the cases in the last note show, equity may refuse specific performance of the latter to the promisor). If so, *Bunn* v. *Harrison* (1886) 3 T.L.R. 146 (C.A.) involved one contract only. (Repudiation allowed for breach of "warranty," so fundamental as to be a "condition," about sanitary state of the premises. There was no formal written contract in that case, and a "one-contract" analysis was plainly appropriate.)

[5] *Carter* v. *Salmon* (1880) 43 L.T. 490, *per* Cotton L.J. at p. 493. (In this case, the alleged oral agreement to repair before demanding rent was inconsistent with the writing, and bad on that ground. But the court was clearly of opinion that the tenant could not have set up any oral agreement against the mortgagee of the reversion. But the latter had no notice of any such agreement. (Compare *Smith* v. *Jones* [1954] 2 All E.R. 823.) What if he had? Such a personal collateral contract would not normally bind him; but his knowledge might well affect the exercise of the court's discretion if equitable remedies were sought. If the collateral agreement touched and concerned the land it might affect an assignee of a lessor or lessee. Compare the rather different case of *Phillips* v. *Miller* (1875) L.R. 10 C.P. 420, p. 437.

when he interprets the landlord's oral promise to the tenant in *Mudd's* case as being one "not to enforce against him *personally*" the covenant in question.[6] In a similar fashion, in *Hodges* v. *Jones*,[7] the collateral contract (had there been one), could not have been enforced against the promisor's purchasers of a registered fee simple.[8]

A rather similar illustration of the peculiarity of the collateral contract arises in respect of bills of exchange. In their case, parol evidence is normally rigorously excluded; oral terms cannot be allowed to control the bill.[9] Bills of exchange and promissory notes must be *in* writing,[10] and therefore oral agreements cannot be allowed to control them.[11] But if the extra terms are agreed upon in writing they are less objectionable. Their effect will, however, depend upon which sort of written agreement it is. "If the agreement is merely collateral, it only affords ground for a cross action and not for a defence to the bill; but there are many cases in which it has been held that the bill and the writing together form only one contract."[12] Where there is only one contract, an indorsee with notice may be affected by the extra written terms; *aliter* if they are merely a collateral contract. Just how the court is to decide whether there are one or two contracts is not made clear by the cases. *Maillard* v. *Page*[12] seems to suggest that they should favour one contract, unless there are two separate transactions and the writing induces the bill, rather in the manner of the prospectus in *Jacobs'* case.[13]

[6] [1958] 3 W.L.R. p. 324 (italics supplied). See, too, Sargant L.J. in *Jacobs'* case [1924] 2 Ch. at p. 339.

[7] [1935] Ch. 657 (Luxmoore J. Alleged oral agreement by vendor of registered land that he would use adjoining strip only as tennis courts.)

[8] Unregistered encumbrances not binding: Land Registration Act, 1925, s. 20 (1). Usually, such agreements are *restrictive covenants* and would today need to be registered as such under the Land Charges Act, 1925. See *Spicer* v. *Martin* (1888) 14 App.Cas. 12 (argued in the C.A. along collateral contract lines: 34 Ch.D. 1).

[9] See Byles on *Bills* (21st ed.), pp. 110–111; Halsbury's *Laws of England* (3rd ed.), Vol. 3, p. 165; Chalmers, *Bills of Exchange* (12th ed.) 55–58. It is not clear how far the exceptions to this rule go. Certainly the true consideration can be proved by parol. (*Abbott* v. *Hendricks* (1840) 1 M. & G. 791, *Turner* v. *Forwood* [1951] 1 All E.R. 746; and the explanation of *Pike* v. *Street* (1828) M. & M. 226 in *Henry* v. *Smith* (1895) 39 S.J. 559.) And evidence can also be given if it would support a plea of the general issue, *i.e.*, to show that there was an unfulfilled condition precedent to the operation of the bill. *New London Credit Syndicate, Ltd.* v. *Neale* [1898] 2 Q.B. 487, 491. See too *Hitchings & Coulthurst Co.* v. *N. Leather Co. of America* [1914] 3 K.B. 907.

[10] Bills of Exchange Act, 1882, ss. 3, 83.

[11] Of course, an oral collateral contract might be enforceable in its own right: as in *Lindley* v. *Lacey* (*supra*).

[12] Channel B., *Maillard* v. *Page* (1870) L.R. 5 Ex. 312 at p. 319.

[13] [1924] 2 Ch. 329 (*ante*, p. 69). Clearly where there is a *third party* in the extraneous agreement, it must be collateral only: *Webb* v. *Spicer* (1849) 13 Q.B. 894; *Salmon* v. *Webb* (1852) 3 H.L.C. 510.

Establishing the Collateral Contract

The previous discussion shows, in the writer's view, that, in the collateral contract, the courts possess a weapon necessary and useful to the modern law of contract. Four matters of importance arise when a party wishes to establish such a contract. They are: (a) proof of contractual intention; (b) the consideration; (c) the subject-matter of the collateral promise; (d) conflict between written and oral terms.

(a) *Intention*

In *Heilbut Symons & Co.* v. *Buckleton* [14] Lord Moulton went on to say:

> "The effect of a collateral contract such as that which I have instanced would be to increase the consideration of the main contract by one hundred pounds and the more natural and usual way of carrying this out would be by so modifying the main contract and not by executing a concurrent and collateral contract. Such collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract are therefore viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts but the existence of an animus contrahendi on the part of all the parties to them must be clearly shewn."

The test of intention is, of course, the same objective test in this situation as elsewhere in the law of contract.[15] The promise must be clear and certain; ambiguity will vitiate the chance of proving a collateral contract.[16] But the big question is whether the promise was so made that a reasonable promisee could have regarded it as something to which the promisor bound himself, and on which he could, and did, rely.[16] The promisee starts with the scales depressed against him. Any laxity on the court's part at this point would result in damages being awarded for mere innocent misrepresentations. The failure to reduce the oral promise to writing is "evidence against a warranty being intended. But it is by no means decisive." [17] To overcome this evidence the promisee must convince the court that the oral promise was really contractual:

[14] [1913] A.C. 30, p. 47.

[15] See *Oscar Chess, Ltd.* v. *Williams* [1957] 1 W.L.R. 370; Lord Wright in *Norwich Union Fire Ins. Soc., Ltd.* v. *Price* [1934] A.C. 455, 463.

[16] See *Hodges* v. *Jones* [1935] Ch. 657, 669, distinguishing *Jameson* v. *Kinmell Bay Land Co., Ltd.* (*supra*). See too *Shepperd* v. *Ryde Corpn.* (1952) 85 C.L.R. 1, pp. 12–17 (H.Ct.Aus.).

[17] Denning L.J., in *Oscar Chess, Ltd.* v. *Williams*, *supra*, p. 376. On rescission of contracts induced by innocent misrepresentations which are not contractually binding, see Cheshire and Fifoot, *op. cit.*, at pp. 211 *et seq.*

" seriously intended to be the basis of the contractual relation," [18] that " without the warranty " (or promise) " the lease " (or other written contract) " never would have been executed." [19] But where the form of the document is such that it raises a *strong* presumption of completeness, there is, in regard to proof of intention, little distinction to be drawn between collateral terms and collateral contracts. Oral collateral terms need to be equally strictly proved, and the courts draw the same distinction with reference to them between statements of opinion and the like, on the one hand, and guarantees upon which a reasonable purchaser would rely, on the other.[20] This high standard is required, it is suggested, where the document *appears* to be a complete contract. The more it resembles a mere memorandum the easier it is for the court to believe that the writing stands side by side with oral *terms*; and this, in practice, naturally affects the decision about the " intention " of the parties.[21] But in the case of a mere memorandum, proof of a collateral *contract* is not made easier; if anything, it ought to be more difficult, because the nature of the document suggests a " one-contract " situation.

(b) *Consideration*

Sometimes the consideration for the promise in the collateral contract is something other than formation of another contract. For example, where a conveyance is preceded by a preliminary contract, the preliminary contract is normally extinguished by the conveyance [22]; but the parties may intend some part of that contract to survive. If they do, the courts will give effect to that intention; and the consideration in such a situation need not be separately discussed.[23] Similarly, where the extra promise is bought with some recognisable extra price, no problem occurs.[24]

[18] Wills J. in *Best* v. *Edwards* (1896) 60 J.P. 9, 10.

[19] A. L. Smith M.R. *De Lasalle* v. *Guildford* [1901] 2 K.B. 215, p. 222. See too *Mahon* v. *Ainscough* [1952] 1 All E.R. 337, p. 340; *Webster* v. *Higgin* [1948] 2 All E.R. 127, pp. 128, 130.

[20] See especially Farwell J. in *Terrene* v. *Nelson* [1937] 3 All E.R. 739 at p. 744. Compare *De Lasalle* v. *Guildford*, *Otto* v. *Bolton*, *Miller* v. *Cannon Mill Estates*, discussed *supra*, p. 62.

[21] See the cases discussed, p. 62, *ante*. And see the two majority judgments in *Oscar Chess, Ltd.* v. *Williams* [1957] 1 W.L.R. 370. Morris L.J., in his dissent, gave greater weight to the presence of a written document in *Routledge* v. *McKay* [1954] 1 W.L.R. 615; but the attitude of the majority is thought to support the view advanced above.

[22] *Greswolde Williams* v. *Barneby* (1900) 17 T.L.R. 110.

[23] *Palmer* v. *Johnson* (1884) 13 Q.B.D. 351, *per* Bowen L.J. at p. 357; *Saunders* v. *Cockrill* (1903) 87 L.T. 30 (C.A.), Lord Alverstone C.J. at p. 31; *Lawrence* v. *Cassel* [1930] 2 K.B. 83 (C.A.). Similarly, there is no problem as to consideration in cases like *Mouat* v. *Betts Motors, Ltd.* [1959] A.C. 71 (J.C.).

[24] Bruce J. in *Lloyd (Edwd.) Ltd.* v. *Sturgeon Falls Pulp Co., Ltd.* (1901) 85 L.T. 162, 165 thought (wrongly) that this was essential. Compare the

But in the *typical* collateral contract case, the consideration given for the promise is no more than the act of entering into the main contract.[25] Going ahead with that bargain is a sufficient price for the promise, without which it would not have gone ahead at all. It is no objection that the transaction *would* have been unenforceable or void had the whole of it been comprised in a single contract. Furthermore, it is now clear that even the main contract itself need not be valid and enforceable. Its formation can be sufficiently that "little something" needed to satisfy the demand for a "price" made by the common law—even in some cases where it is void for illegality, as in *Strongman, Ltd.* v. *Sincock*.[26]

(c) *The Subject-Matter of the Promise*

Where the subject-matter of the collateral promise is extraneous to the main transaction the promise has been more readily accepted as a collateral contract; but where it concerned the present state of the subject-matter of the main written contract many judges were unwilling to receive it. It is sometimes suggested that only where, as in *Jameson* v. *Kinmell Bay Land, Ltd.*,[27] the collateral promise is on an "independent matter" of a "temporary and immediate" character is it admissible.[28] At the critical

attempts to turn auctioneers' promises to sell "without reserve" into contracts collateral to the sale; the consideration on the customers' part can be thought of as going to, and bidding at, the auction sale. See Professor Gower's suggestion in (1952) 68 L.Q.R. 457, at p. 459, concerning *Warlow* v. *Harrison* (1859) 1 E. & E. 309. The case seems equally open to the "typical" collateral contract explanation.

25 Either with a third party (as in the cases discussed *ante*, p. 68) or with the same party. The consideration, it is suggested, is invariably that *act* (*i.e.*, executed not executory). It could be executory—(a promise to make the main contract)—so long as the terms of the latter were already certain: see *ante*, p. 68, n. 66. Evershed M.R. in *Routledge* v. *McKay* [1954] 1 W.L.R. 622 seems to suggest that those terms must *always* be known at the time of the collateral promise; but this seems unnecessary if the collateral contract is "unilateral," and the consideration executed.

26 [1955] 2 Q.B. 525 (but see *ante*, p. 74, n. 97). This occasions less surprise when compared with the many cases in which the value given as consideration was barely perceptible. Consider: *Haigh* v. *Brooks* (1839) 10 A. & El. 309; affd., *ibid.*, 323; *Rajbenbach* v. *Mamon* [1955] 1 Q.B. 283. The formation of a contract void or unenforceable on other grounds would presumably be equally effective, *e.g.*, one void by reason of mistake. It is sometimes suggested that a contract of sale, "void for mistake" because the specific subject-matter has perished unbeknown to both parties, can form the consideration for a promise by the seller that the goods do exist. But it is suggested that this is rarely an appropriate analysis, and that such a seller's guarantee will usually form part of the *one* contract, ousting the understanding, normally implied in such a case, of "*no goods, no contract*": see *McRae* v. *Commonwealth Disposals Commission* (1951) 84 C.L.R. 377. S. 6 of the Sale of Goods Act, 1893, does not, it is suggested, prevent this solution, because of the operation of s. 55. (*Contra* Cheshire and Fifoot, *Contract* (4th ed.), p. 176 (n), who seem to think that the guarantee would not be actionable at all.)

27 (1931) 47 T.L.R. 593 (C.A.).

28 See Cockle's *Cases and Statutes on Evidence* (9th ed. by G. D. Nokes) at p. 341.

period for the collateral contract, that between *Lindley* v. *Lacey* [29] and Lord Moulton's dicta in *Heilbut Symons, Ltd.* v. *Buckleton*,[30] many judges joined in a refusal to permit collateral warranties as to the *present state* of the main subject-matter. In *Jones* v. *Lavington*, Collins M.R. tartly rejected such an idea as being "obviously untenable. Such an agreement, if there was one," he said, "was in reference to the subject-matter itself of the contract and must be found in it." [31] And ten years earlier the Divisional Court actually decided, in *Gale* v. *Harvey*, that "there could not be a collateral agreement dealing with the present condition of the subject-matter of the principal contract." [32]

But this was not a position of strength from which to withstand the encroachment of the new doctrine. A contractual obligation can today be equally well based upon a guarantee of present fact as on a promise about future action.[33] And the fact that the subject-matters of collateral and main contracts were the same has never vitiated collateral "promises"; there is no reason why it should be all-important in the case of a guarantee. This argument was expressly rejected by Bruce J.,[34] but accepted by the Court of Appeal unanimously in *De Lasalle* v. *Guildford* [35]; and more recently the point made in *Gale* v. *Harvey* [32] does not seem to have been put in cases in which it might well have provided counsel with ammunition.[36] In *Webster* v. *Higgin* [37] an oral guarantee of the present condition of a car was enforced as a collateral contract in return for which the hire-purchase agreement was signed. Even in those few cases where written evidence of the main contract is still required, it is submitted that it is incorrect to suggest that a guarantee of this kind cannot *ever* be a collateral contract,

[29] (1864) 34 L.J.C.P. 7.
[30] [1913] A.C. 30, 47.
[31] [1903] 1 K.B. 253, p. 256 (alleged oral agreement about house, written lease). For a fascinatingly unsuccessful attempt to adopt this dictum without violating the other decisions, see Eve J. in *Crawford* v. *White City Rink* (*Newcastle on Tyne*) *Ltd.* (1913) 29 T.L.R. 318, at p. 319; (his decision of the case did not turn upon his view of the law, since he found insufficient evidence that an oral agreement was ever made).
[32] (1893) 95 L.T.J. 82. See too Wills J. in *Kennard* v. *Ashman* (1894) 10 T.L.R. 213, 214.
[33] See Williston (1911) 24 Harv.L.R. 415, "Liability for Honest Misrepresentation," and (1913) 27 Harv.L.R. 1, "Representation and Warranty"; Stoljar (1952) 15 M.L.R. at p. 427.
[34] See (1901) 84 L.T. 549, pp. 550–551. "I do not know of any case where a warranty as to the existing condition of the subject-matter of the sale or lease has been held to be collateral. . . . I doubt very much whether any such verbal warranty could be . . . said to be collateral to the main contract."
[35] [1901] 2 K.B. at p. 223.
[36] *e.g.*, *Mahon* v. *Ainscough* [1952] 1 All E.R. 337 (C.A.).
[37] [1948] 2 All E.R. 127. Both Lord Greene M.R. (pp. 128 and 129) and Evershed L.J. (p. 130) treat the guarantee as a collateral contract. Whether the Hire Purchase Act, 1938, applied to the written agreement was clearly of no consequence.

although the courts will no doubt be slow to accept it as such when its enforcement would merely evade the statutory requirement for a comprehensive written memorandum.[38]

(d) *Conflict with the written contract*

Webster v. *Higgin*[39] raises, too, the question of a conflict between the oral and written contracts. It is clear that the oral agreement will "add to or vary" the writing.[40] But if the written terms *contradict* the oral statement, then the court must surely hold that the later written expression of the parties' intention shall prevail. This is so whether the oral promise is put forward as collateral term or collateral contract.[41] It is sometimes said that the oral agreement can stand only if the written contract is "wholly silent" about, or does not "deal with"[42] the matter. But this is not the case. In *Morgan* v. *Griffith*,[43] *Erskine* v. *Adeane*,[44] *Lindley* v. *Lacey*,[45] and even *De Lasalle* v. *Guildford*,[46] the lease "dealt with" the matters affected by the promise. The oral contracts survived because they were not *contradicted* by the writing.

In consequence of this rule, a court which desires to uphold an oral agreement which at first sight seems to conflict with the written one will on occasion go to great lengths to construe the latter so as to avoid such contradiction. In *Webster* v. *Higgin*, for example, the written hire-purchase agreement signed by the

[38] See, *e.g.*, *Bailey* v. *Woolstone Bros.* (1907) 42 L.J. 457 (C.A.). Phipson on *Evidence* (9th ed.), p. 604, still suggests that in such a case a collateral agreement is enforceable only if it deals with an "independent matter." *Sed quaere.*

[39] [1948] 2 All E.R. 127.

[40] The attempt made by P. O. Lawrence J. in *Jacobs* v. *Batavia and General Plantations Trust, Ltd.* [1924] 1 Ch. 287, 296, to show that this is not the case is unconvincing.

[41] On collateral terms: cases such as *Henderson* v. *Arthur* [1907] 1 K.B. 10, cited *ante*, p. 61. On collateral contracts: *Erskine* v. *Adeane* (1873) L.R. 8 Ch. 756, 766 (Mellish L.J.); *Llanelly Ry.* v. *L. & N. W. Ry.* (1873) L.R. 8 Ch. 942, 953, 954 (C.A.) (affd. (1875) L.R. 7 H.L. 550); *Horncastle* v. *Equitable Society* (1906) 22 T.L.R. 735 (C.A.); *Carter* v. *Salmon* (1880) 43 L.T. 490 (C.A.). With regard to oral terms, it has been held further that for this purpose terms implied into a written contract (*e.g.*, by custom) have the same effect as if they were express; on this ground attempts to prove oral terms contradicting the implied terms have failed: *Fawkes* v. *Lamb* (1862) 31 L.J.Q.B. 98, 100 (Blackburn J.). But parol evidence as to surrounding circumstances is admissible to govern the nature of the implied terms themselves, *e.g.*, *Burges* v. *Wickham* (1863) 33 L.J.Q.B. 17, 23 (Cockburn C.J.), 28 (Blackburn J.)

[42] See Halsbury, *Laws of England* (3rd ed.), Vol. 11, pp. 404–405 and Vol. 23, p. 575.

[43] (1871) L.R. 6 Ex. 70 (see especially the tenant's covenant to use his best endeavours to preserve game: p. 71).

[44] (1873) L.R. 8 Ch. 756.

[45] (1864) 17 C.B.(N.S.) 578 (the oral agreement *obliged* the defendant to settle the action; the writing *authorised* him to do so).

[46] [1901] 2 K.B. at p. 222 (lessee's covenant to do inside repairs included repairs to interior drains).

buyer stated that he was "deemed to have . . . satisfied himself" as to the state of the car; and added "no warranty condition description or representation . . . is given or implied" on the dealer's part as to its state or quality. Could the prior oral guarantee survive this clause? By an astute piece of construction *contra proferentem* the Court of Appeal managed to arrange it. The oral guarantee meant "if you buy this car, I will guarantee it," said Lord Greene M.R.[47] That was the "warranty which was given in consideration of the purchaser entering into the contract." The exemption clause was not strong enough to exclude the operation of that warranty. The contract could not mean "If you the purchaser will sign this contract which contains an exclusion of every guarantee I will guarantee the car." The clause said: "No warranty *is* given"—not "No warranty *has been* given." The oral warranty had been seriously given, and it had not been effectively nullified.

Desperate efforts of this sort to find a gap in the writing illustrate a belief in the rigidity of the rule prohibiting contradiction. But there are indications that the courts are beginning not to apply this rule so strictly. First, in the cases concerned with collateral terms, they have recently been more ready to admit oral warranties along with written terms with which the warranties appeared to conflict. *Harling* v. *Eddy*,[48] is a case of this character. One of the printed conditions of sale (No. 12) at an auction expressly excluded "any legal force or effect" of a "warranty" given at the sale unless the same appeared on the purchaser's account. The defendant, on seeing that no one would bid for his heifer, orally stated that there was nothing wrong with her, and if there was, he would take her back. Bidding thereupon began, and the plaintiff bought her. She died of advanced tuberculosis a month later. The Court of Appeal held[49] that even if this statement was only a warranty and no more, it was nevertheless not rendered nugatory by condition 12. The defendant, they held, intended to sell on the faith of what was said to the exclusion of the stultifying printed conditions.[50] It may be said that this decision

[47] [1948] 2 All E.R. 127, pp. 128–129. (And see Evershed L.J., p. 130.) Compare *Couchman* v. *Hill* [1947] K.B. 554, p. 559 (Scott L.J.).

[48] [1951] 2 K.B. 739 (C.A.). See too *Couchman* v. *Hill* [1947] K.B. 554: (auctioneer's and owner's supplementary oral assurances that heifer was "unserved" (as described in catalogue) actionable, in spite of written conditions of sale excluding responsibility for misstatements, faults, and errors of description).

[49] They held first that the statement was a "condition"; on a construction of the printed terms *contra proferentem*, they did not, therefore, affect the guarantee.

[50] See Evershed M.R. at p. 744: quoting Scott L.J. in *Couchman* v. *Hill* [1947] K.B., p. 559, a passage which seems to use a collateral contract analysis.

should not be taken too far. The writing was no more than printed conditions of sale which had been before the parties prior to the auction sale; and the oral promise was made at the sale itself. It might be different if the oral promise contradicted a term in a subsequent, formal, written contract signed by the parties.[51] But in *Mudd's* case,[52] Harman J. enforced as a collateral contract an oral promise which amounted to no more than a withdrawal of the landlord's rights stated in the subsequent lease. The covenant meant that the premises could be used only for trade purposes; but the landlord could not enforce that covenant against this tenant because he had promised to let him live there. This is a real case of conflict between oral and subsequent written terms, and it is heartening to see that Harman J. did not automatically reject the collateral contract on this ground. Had the promise been made *after* the lease began, it would have given the tenant a defence in equity to any action brought to enforce the covenant.[53] If the promise had been a temporary waiver, it is true that the landlord could have reasserted his rights after giving reasonable notice.[54] But if the promise were to suspend the covenant for the period of the tenant's personal occupation, and he had altered his position in reliance upon it, the landlord would, it is submitted, have been unable to withdraw the suspension while he continued to occupy, and the equity would have arisen for him throughout that period.[55]

If that is correct, why should the tenant be in a weaker position only because the promise was made to him before rather than after the lease was executed? If anything his position should be better. There is no reason why a collateral contract which "contradicts" the lease in this manner, *i.e.*, by suspending or abrogating the right of the promisor to sue in respect of one covenant, should not be enforced by the court if the necessary *animus contrahendi* can be

51 In [1951] 2 All E.R. at p. 218, Denning L.J. appears to suggest that this would be so, and that this is the distinction between *Lee* v. *Gray* (1929) unreported, and *Taylor* v. *Bullen* (1850) 5 Ex. 779. But this passage does not appear in the Law Reports: [1951] 2 K.B., p. 748!

52 [1958] 2 W.L.R. 312.

53 The "*High Trees*" doctrine of equitable waiver to which Harman J. referred.

54 *Tool Metal Manfg. Co., Ltd.* v. *Tungsten Electric Co., Ltd.* [1955] 2 All E.R. 657 (H.L.).

55 It is suggested that it would not be equitable to allow a withdrawal by the landlord if he has made a clear promise not to enforce this covenant over a definite period. See Lord Cairns, in *Hughes* v. *Metropolitan Ry. Co.* (1877) 2 App.Cas. 439, 448; and Denning J. in *Central-London Property Trust, Ltd.* v. *High Trees House, Ltd.* [1947] K.B. 130. J. F. Wilson (1951) 67 L.Q.R. 330, suggests that the equity can never abrogate, only suspend, rights. Even if that is so (which is not yet apparent from the case law), a promisor can clearly put it out of his power for a period to reintroduce the original terms by notice, *e.g.*, by a promise not to enforce a right "for the next six weeks" on which the promisee relies. Another way of putting the point is to say that in such a case no notice less than six weeks would be reasonable.

discovered. There is more difficulty, perhaps, in cases where the oral contract adds a positive guarantee which the written contract appears to reject [56]; in such a case, for anything to survive of the sanctity of written contracts, the guarantee should be rejected if no gap can be found in the writing to let through the oral promise. Where, on the other hand, as in *Mudd's* case, the oral contract works to detract from the promisor's rights set out in the written contract, there is every reason, today, for enforcing the intention of the parties.

But there is little authority, it must be admitted, for this suggestion. The prohibition of contradiction is, in most of the cases, absolute. Whether the decision in *Mudd's* case can be supported, is, therefore, one of the most important outstanding questions. A more liberal interpretation of the rule about contradictions will enable justice to be done in cases like *Mudd*, and only the "collateral contract" can do it.

Conclusion

The courts have in this century clearly placed the main emphasis of their decisions on the question: what was the intention of the parties —that is to say, what, from an objective point of view, appears to be included by them within the area of contractual obligation? The parol evidence rule has long been a tautology because of the prominence of that question. In most cases, it will be the decisive question; and once it is answered, nothing turns on whether there is one contract or two. So far one may go with Cheshire and Fifoot.

But the distinction between the two different analyses is emphatically not an unhelpful technicality. The "collateral contract" is a weapon of great utility for the enforcement of promises apparently intended to be binding. It should not be used where the court cannot discover two distinct stages or parts of the transaction.[57] But where there can be found two such stages, and especially where a written contract has been made in reliance upon an oral representation to which the promisor intended to bind himself, there is a place for the "collateral contract." The case must be such a one as Erle C.J. demanded in *Lindley* v. *Lacey*: "If

[56] As in *Webster* v. *Higgin* [1948] 2 All E.R. 127.

[57] So far one can adopt the words of Bruce J. in *Lloyd* (*Edward*) *Ltd.* v. *Sturgeon Falls Pulp Co., Ltd.* (1901) 85 L.T. 162, 165: "in the ordinary case where a man is induced to enter into a contract by reason of a warranty his entering into the contract is the consideration for the warranty and there is no other consideration for the warranty and the warranty therefore forms part of the contract."

you will put your name to that, I will do so and so."[58] Or, today, the promise might be: "I guarantee so and so." We have seen that the actual or possible invalidity of the main contract does not necessarily prevent the enforcement of the collateral contract. In a society in which people are daily led to enter into written contracts which they do not understand on the basis of oral promises which they do understand, the value of this weapon of justice is likely to increase.

[58] (1864) 34 L.J.C.P., p. 9. See too (1910) 26 L.Q.R. 194 (on *Mercier* v. *Campbell* [1907] 14 Ont.L.R. 639).

DAMAGES AND INCOME TAX

J. A. Jolowicz

Although the whole of a man's rights and interests, which include his rights in his own personal safety, may not be readily divisible between his income and his capital assets, it is axiomatic that all those rights and interests are either subject to tax or not. It follows, therefore, that in an action for damages a claim may be made not only for loss of or damage to some non-taxable interest, but also, and perhaps exclusively, for a reduction in the plaintiff's taxable income caused by the wrongful act of the defendant. In such cases the plaintiff's liability to tax may become a relevant consideration, either as between himself and the Commissioners of Inland Revenue or as between himself and the defendant. It is the purpose of this article to consider some aspects of the inter-relationship of damages and tax, with particular reference to the decision of the House of Lords in *British Transport Commission* v. *Gourley* [1] and the subsequent Report of the Law Reform Committee.[2]

Taxation of Damages

The law governing the taxation of damages has undoubtedly developed its fair share of technicality, but its general principles can nevertheless be stated quite shortly. The nature of the harm suffered by the plaintiff must be determined to see whether he would have been taxable in respect of the interest which has been affected. If, and only if, that interest would have been taxable, damages or other compensation paid for interference with it will also be taxable. If damage is done to the plaintiff's capital assets then no tax will be payable on the compensation paid therefor, since capital is not taxed. In *Inland Revenue Commissioners* v. *Newcastle Breweries*,[3] for example, compensation was paid to wine and spirit merchants for the requisitioning by the Admiralty of a quantity of their rum. It was held that the requisitioning was the equivalent of a compulsory sale, and therefore that the compensation must be treated as a trading receipt and be brought into the profit and loss account for the year.[4] On the other hand, as was

[1] [1956] A.C. 185.
[2] Seventh Report (Effect of Tax Liability on Damages). August, 1958. Cmnd. 501.
[3] (1927) 12 T.C. 927 (H.L.)
[4] A similar principle applies to insurance payments following the destruction of the taxpayer's stock in trade and to War Damage payments when made to a

held in the leading case of *Glenboig Union Fireclay Co.* v. *Inland Revenue Commissioners*,[5] compensation is not taxable if paid in respect of interference with or injury to the taxpayer's capital assets, nor are damages taxable if they represent reimbursement of sums expended by the taxpayer for the protection of such assets.

The working of this branch of the law is probably nowhere better explained than in the judgment of Lord Clyde (Lord President) in *Burmah Steamship Co.* v. *Inland Revenue Commissioners.*[6] In that case shipowners contracted with ship-repairers for the repair of a ship. The contract stipulated that the repairs would be carried out within a certain time, but the time limit was exceeded and the ship-repairers settled the claim against them by the payment of damages. It was held that the damages were taxable in the hands of the ship owners. They represented the estimated loss of profits suffered by the shipowners as a result of the delay. In the course of his judgment Lord Clyde said: " Suppose someone who chartered one of the appellants' vessels breached the charter, and exposed himself to a claim of damages at the appellants' instance; there could, I imagine, be no doubt that the damages recovered would properly enter the appellants' profit and loss account for the year. The reason would be that the breach of the charter was an injury inflicted on the appellants' trading, making (so to speak) a hole in the appellants' profits, and the damages recovered could not therefore be reasonably or appropriately put by the appellants—in accordance with the principles of sound commercial accounting—to any other purpose than to fill that hole. Suppose, on the other hand, that one of the appellants' vessels was negligently run down and sunk by a vessel belonging to some other shipowner, and the appellants recovered as damages the value of the sunken vessel. I imagine that there could be no doubt that the damages so recovered could not enter the appellants' profit and loss account; because the destruction of the vessel would be an injury inflicted, not on the appellants' trading, but on the capital assets of the appellants' trade, making (so to speak) a hole in *them*, and the damages could therefore—on the same principles as before—only be used to fill *that* hole."

It can be said in general, therefore, that while damages for loss of income will be regarded as being themselves income accruing to the plaintiff, and so taxable in his hands, damages for a capital loss

property dealing company: *Gliksten* v. *Green* [1929] A.C. 381; *London Investment Co.* v. *Inland Revenue Commissioners* [1958] 2 W.L.R. 842 (H.L.). See also *Shadbolt* v. *Salmon Estate* (1943) 25 T.C. 52; *Johnson* v. *Try* [1946] 1 All E.R. 165.

[5] 1922 S.C. 112 (H.L.)

[6] 1931 S.C. 156, 159.

will no more be taxable than would the capital asset which the plaintiff has lost. The damages retain the characteristics of the assets they replace.

Gourley's Case

If this general principle of revenue law had retained its basic simplicity, the problems considered by the House of Lords in *Gourley's* case [7] and by the Law Reform Committee would, it is submitted, never have arisen.

In *Gourley's* case, it will be recalled, the plaintiff suffered personal injuries as a result of the defendants' negligence and was incapacitated from carrying on his profession. In addition to damages for pain and suffering and for out-of-pocket expenses, the trial judge awarded him a total of £37,720 for "loss of earnings" actual and prospective. This figure was based upon the plaintiff's gross earnings on which he would, of course, have had to pay tax had he in fact earned them. His net "loss of earnings" was only £6,695.

It is submitted that, if the general principles outlined above had been applicable, no question of the amount actually payable by the defendants would have arisen. They would have been liable for the full £37,720, but, if the damages were damages for loss of income, the plaintiff would only have been able to enjoy the balance of this sum after tax, namely £6,695. The remainder would have been paid to the Revenue.

It was agreed by counsel for both parties, however, that if the plaintiff were awarded £37,720 he would be entitled to retain the whole sum, which would not be taxable in his hands. He would thus receive by way of damages a sum very much greater than his real loss. The trial judge and the Court of Appeal, being bound by existing authority [8] were obliged to hold that the plaintiff was entitled to the full £37,720. The House of Lords, however,[9] overruled the earlier authorities and held that the plaintiff should receive the reduced sum of £6,695. Otherwise the result would have been to give the plaintiff more than he had lost and this, since damages are compensatory and not punitive, could not be permitted.[10]

[7] *British Transport Commission* v. *Gourley* [1956] A.C. 185.
[8] *Billingham* v. *Hughes* [1949] 1 K.B. 643, affirming *Fairholme* v. *Firth and Brown* (1933) 149 L.T. 332.
[9] Lord Keith of Avonholm dissenting.
[10] This is the fundamental basis of the reasoning in the House of Lords. The detail has been considered elsewhere. See, *e.g.*, Baxter, 19 M.L.R. 365; 72 L.Q.R. 153; Munkman, 106 L.J. 20; 100 S.J. 809, 828, 849; Smith, 1956 S.L.T. 13.

In his speech in *Gourley's* case Lord Goddard [11] expressed the view that a similar result should follow in cases of wrongful dismissal, and this view has since been adopted in at least two cases.[12] The principle of *Gourley's* case has also been applied to the assessment of damages for mesne profits in an action of trespass [13] and, by the House of Lords itself, to the assessment of compensation for loss of profits resulting from interference with a business in the exercise of statutory powers.[14] In all these cases the same point is held to apply. The plaintiff is being awarded damages, or compensation, for loss of income and, since the damages or compensation will not be liable to tax, all that need be paid is the net loss after allowing for the tax the plaintiff would have had to pay had he earned the income in the ordinary way. To do more would be to over-compensate the plaintiff.

It will be seen, therefore, that there are two conditions which must be fulfilled if the principle of *Gourley's* case is to apply. First there must be an award of damages or compensation for loss of taxable income. Secondly the damages or compensation must themselves be free of tax in the recipient's hands.[15] It follows, therefore, that however important numerically are the cases in which these conditions are fulfilled, the cases themselves must be regarded as exceptional. In the ordinary way, as has been shown, damages retain the characteristics of the assets they replace and are either capital or income according to the nature of those assets. How, then, does it come about that damages for loss of earnings in personal injury cases, and damages for wrongful dismissal, to take the two most important cases, are not taxable?

Damages Free of Tax

Surprisingly enough there seems to be no actual authority on the taxability of damages for loss of earnings in personal injury cases.[16] There are, however, numerous authorities concerning the repudiation

[11] At p. 210.

[12] *Beach* v. *Reed Corrugated Cases* [1956] 1 W.L.R. 807; *Re Houghton Main Colliery* [1956] 1 W.L.R. 1219. In *Phipps* v. *Orthodox Unit Trusts* [1958] 1 Q.B. 314, also a case of wrongful dismissal, the Court of Appeal held that the plaintiff may be required to disclose particulars of his tax liabilities during the interlocutory stage of the action.

[13] *Hall* v. *Pearlberg* [1956] 1 W.L.R. 244.

[14] *West Suffolk County Council* v. *Rought* [1957] A.C. 403. *Gourley's* case has even been applied, in reverse (so to speak), to increase an award of salvage because the recipients would have to pay tax on the award: *The Telemachus* [1957] P. 47. This decision has, however, not been followed: *The Makedonia* [1958] 1 Q.B. 365.

[15] *Hall* v. *Pearlberg* [1956] 1 W.L.R. 244.

[16] In the United States, so far as Federal Taxation is concerned, the exemption is statutory: Internal Revenue Code 1954, s. 104 (a) (2).

of service and similar contracts, and it is convenient, therefore, to consider those cases first.

An examination of the cases in which tax has been held not to be payable on damages for the repudiation of a service contract shows that lip-service, at least, is paid to the general principles already referred to. In other words it is held in those cases that the damages are not awarded for loss of income at all. The plaintiff has not merely lost the income he would have received under the contract but the whole congeries of rights which he would have enjoyed under the contract.[17] His loss is the loss of " office "—a capital asset.

The foundation of this rule was probably laid by Rowlatt J. in *Chibbett* v. *Robinson*[18] and has since been applied on many occasions.[19] It must not be thought, however, that it applies in all cases where damages are awarded for breach of contract, even if that breach amounts to a repudiation. In *Short Bros.* v. *Inland Revenue Commissioners*,[20] for example, a sum of money paid in consideration of the cancellation of a shipbuilding contract was held to be a trading receipt in the hands of the shipbuilders. The taxpayer must establish, as Lord Evershed M.R. has pointed out,[21] " that, in truth and in substance, what the taxpayer parted with was not merely his rights and expectations under a contract entered into in the ordinary course of his trade, but was a parting by him with one of his enduring capital assets." [22]

Although there is no actual authority, it is so generally agreed that damages for " loss of earnings " are not subject to tax that the point can no longer be argued. Nevertheless in the absence of judicial decision one can only guess the reason for their exemption. In the light of the authorities on service contracts and of the general principles already mentioned, however, it is safe to say that here too, for the purposes of Revenue law at least, the damages are regarded not truly as damages for " loss of earnings " but for loss of a capital asset. This may conveniently be called loss of " earning capacity."

If this is correct it follows that no inconsistencies are to be found in this branch of the Revenue law, but that damages are invariably treated as having the characteristics of the assets they replace. It is because they are awarded in respect of capital losses that the

[17] *Van den Berghs* v. *Clark* [1935] A.C. 431.
[18] (1924) 9 T.C. 48.
[19] *e.g.*, *Du Cros* v. *Ryall* (1935) 19 T.C. 444; *Henley* v. *Murray* [1950] 1 All E.R. 908; *Sabine* v. *Lookers, Ltd.* [1958] T.R. 109.
[20] (1927) 12 T.C. 955.
[21] *Wiseburgh* v. *Domville* [1956] 1 W.L.R. 312, 320.
[22] See also *Shadbolt* v. *Salmon Estate* (1943) 25 T.C. 52; *Household* v. *Grimshaw* [1953] 2 All E.R. 12.

damages in cases of wrongful dismissal and those awarded in personal injury cases are free of tax in the plaintiff's hands.

The Paradox

Nevertheless it is invariably the case in actions for wrongful dismissal that the damages are calculated by reference to the sums which the plaintiff would have received under the contract had it not suffered premature termination. Subject to the rules about mitigation of damage, the plaintiff will recover the wages or salary which he would have earned during the period of notice appropriate to the contract.[23] Similarly in cases of personal injury the damages are calculated by reference to the plaintiff's past earnings and his estimated future earnings.[24] It is for this reason, it is submitted, that the Law Lords in *Gourley's* case took the view that tax was a relevant consideration. Had they considered they were dealing with a capital loss suffered by the plaintiff there could have been no question of taking tax into account. The plaintiff would have suffered a loss equal to the gross value of the capital asset involved, and that value must be the measure of the defendant's liability.

Gourley's case, therefore, depends upon a paradox. For the purposes of Revenue law the damages received by the plaintiff were regarded as having been awarded in respect of a capital loss. Otherwise they would have been taxable in his hands. For the purpose of assessing the damages, however, what the plaintiff had lost was income, for how otherwise could his liability to income tax be in the least degree relevant?

The existence of this paradox is reflected in the views expressed by the Law Reform Committee, though in the House of Lords the speeches simply proceed on the assumptions that the damages were awarded for loss of earnings and that they were not taxable. With respect, none of their Lordships seems to have appreciated that these assumptions contradict each other.

The Law Reform Committee found itself unable to make any recommendations about the law as laid down in *Gourley's* case because no less than three different views commended themselves to the various members of the Committee. Three members of the Committee[25] thought that the law should be what it was thought to have been before *Gourley's* case. This view, which may be called the "first minority view," holds that the plaintiff should receive his damages without reduction on account of tax, and that the damages should not be taxable in his hands. Three other

[23] See below, p. 96.
[24] See below, pp. 94–95.
[25] Mr. Justice Donovan, Mr. Parker and Professor Wade.

members,[26] in what may be called the "second minority view" also recommended that the plaintiff should recover the gross amount of his damages, but thought that the damages should be taxed. The remaining members,[27] in the "majority view," considered that the law as established by *Gourley's* case was satisfactory.

The first minority view places in the forefront of its reasoning the proposition that the plaintiff has suffered a capital loss. It states the general principle that damages should restore the plaintiff to the position in which he would have stood but for the defendant's wrong-doing and proceeds[28]: "On this basis they should represent compensation for loss of earning capacity and not for loss of earnings. In a case of personal injuries, what the plaintiff has lost is the whole or part, as the case may be, of his natural capital equipment and to tax him on this is contrary to generally accepted principles of taxation." This has, at least, the merit of consistency. The damages are awarded for a capital loss and therefore taxation is wholly irrelevant.

The second minority view, that the plaintiff should receive his damages in full but should pay tax on them, is also consistent. This view plainly regards the damages as awarded for loss of income and accordingly holds that they should be taxed.

It is in the majority view that the paradox involved in *Gourley's* case is really brought to light. It is accepted that the damages are not taxable, yet in their assessment the plaintiff's liability to tax must be taken into account. Moreover the inconsistency involved is emphasised in the passage of the Report in which objection is taken to the proposal that the damages should be taxed. The main argument for the rejection of that proposal is "the fact that a person whose earning capacity is wholly or partly destroyed loses the whole or part of a capital asset—sometimes the only one he has. It is fundamental in our income tax code that capital is not taxed, and in the view of those opposed to Mr. Foster, Mr. Gardiner and Sir David Hughes Parry, a worse start in this direction could hardly be made than to tax as income the compensation a man receives because his ability to earn a living has been wrongfully destroyed or crippled."[29]

Nevertheless, accepting as it does that the law as laid down in *Gourley's* case is satisfactory, the majority view evidently regards it as right that the man whose "ability to earn a living has been

[26] Mr. Foster, Mr. Gardiner and Sir David Hughes Parry.
[27] Lord Justice Jenkins, Lord Justice Parker (as he then was), Lord Justice Pearce, Mr. Justice Diplock, Mr. Burrows, Professor Goodhart, Mr. Gray, Mr. Megarry and Mr. Morley.
[28] Para. 8 (a).
[29] Para. 9. This objection is, of course, entirely consistent with the first minority view.

wrongfully destroyed or crippled" should suffer the equivalent of taxation on the compensation he receives. With great respect, if his loss is properly regarded as a capital loss then, not only should a plaintiff not pay tax on the compensation he receives, but he should not suffer a reduction in the amount of that compensation on account of the tax he would have paid but for the injury. It is, surely, only because they looked upon the plaintiff's loss as being at the same time both a capital and an income loss that the majority of the Committee were able to approve the result in *Gourley's* case?

The distinction between capital and income is, admittedly, a difficult one to apply in many circumstances, and what may from one point of view appear clearly as income may, from a different point of view, appear equally clearly as capital. Nevertheless, it is submitted, the law should not normally regard the same payment in the hands of a recipient to be at the same time both capital and income.

The Minority Views

If this is accepted, it follows that one or other of the minority views in the Report should be adopted. Either a plaintiff should pay tax on his damages because they are damages for loss of income, or alternatively the damages are compensation for a capital loss and tax is therefore wholly irrelevant. It is submitted, with great respect, that in no case should the damages payable by a defendant be reduced on account of the plaintiff's liability, or non-liability, to tax and therefore that a revision of the law is required.

In the ordinary way it is of little purpose to suggest, however respectfully, that the House of Lords reached an unfortunate conclusion, and in any event, in the light of counsel's agreement that the damages would not be taxable, it is difficult to argue convincingly that a different result should have been reached in *Gourley's* case itself. However the fact that the Lord Chancellor invited the Law Reform Committee to consider the law laid down in that case indicates that he might have been prepared to initiate legislation, and it is to be hoped that he will not now regard the matter as closed. With this in mind it is, perhaps, worth while to consider the two minority views a little more closely.

As has already been indicated, the fundamental difference between the two views seems to be that the first holds that the damages in question are awarded for loss of capital while the second holds that they are awarded for loss of income. *Gourley's* case has been applied to cases other than cases of wrongful dismissal and

personal injury, but these are, perhaps, the most important, and it is proposed to consider them alone.

Loss of Earnings

In an action for personal injuries where a plaintiff has become temporarily or permanently incapacitated from earning his living, it is obviously possible logically to argue either that he is to be compensated for his loss of earning capacity or that he is to be compensated for his actual and prospective loss of earnings. It is thought, therefore, that there is little to be gained in the present context from an analytical discussion of the point. Convincing theoretical arguments can be advanced on either side. Nor is anything to be gained from an examination of the language regularly used by the judges in personal injury cases. The phrases "loss of earnings" and "loss of earning capacity" are used quite indifferently and without reference, it is suggested, to the difference between capital and income. Nevertheless it does seem to be the case that the view that the damages are awarded for loss of earnings is consistently held by the courts.

It is the practice in personal injury cases to divide the damages for loss of earnings [30] between the special and the general damages. Loss of earnings actually incurred by the date of the hearing is classed as part of the special damage. Prospective loss, on the other hand, is classed as part of the general damage. No significance attaches, however, to this division of the damages. One of the numerous meanings of "general damage" is simply "damage which up to the time of the hearing has not yet crystallised in actual disbursement (and) is still prospective." [31] It is simply because prospective loss of earnings is prospective that it forms part of the general damage. For present purposes the distinction between the special and the general damages can be ignored.

The leading case on damages for loss of earnings, *Phillips* v. *London & South Western Railway*,[32] which was tried twice before a jury, twice before a Divisional Court and twice before the Court of Appeal, lends considerable support to the view that the damages are awarded for loss of income. The plaintiff was a physician who had been permanently incapacitated from carrying on his profession. Throughout all six hearings emphasis was laid on the plaintiff's "pecuniary loss" and Cotton L.J. actually said that "the

[30] The use of this expression here should not be regarded as a pre-judging of the question under discussion.

[31] *Per* Asquith L.J. in *Shearman* v. *Folland* [1950] 2 K.B. 43. See also *per* Bowen L.J. in *Ratcliffe* v. *Evans* [1892] 2 Q.B. 524.

[32] (1879) 4 Q.B.D. 406; (1879) 5 Q.B.D. 78; (1879) 5 C.P.D. 280.

pecuniary loss consists of the loss of income, which the plaintiff, but for the accident, would have earned, and was prevented by the accident from earning." [33]

In *Harris* v. *Bright's Asphalt Contractors* [34] the plaintiff, aged 35, was so seriously injured that his expectation of life was reduced to a maximum of two years from the date of the trial. Damages were, of course, awarded for loss of expectation of life, but these damages do not include any element of lost earnings.[35] Nevertheless, Slade J., after a most careful review of the authorities, held that the plaintiff could be compensated for prospective loss of earnings only for the period of his shortened life. He could recover nothing for the period during which, *ex hypothesi*, he would be dead.

This decision has been severely criticised by Kemp and Kemp [36] and the gravamen of their complaint is that Slade J. was wrong in holding that he could not award damages for loss of earnings for a period when the plaintiff would not be alive to earn them. This is wrong, according to the learned authors, because " it is the power to earn what he earned before the accident which has been taken away from him." [37]

This criticism would be justified if it were indeed the case that damages are awarded for loss of earning capacity. The value of the capital asset could only be measured by reference to the pre-accident expectation of life. But on the basis that the plaintiff is to receive compensation for loss of earnings properly so-called, Slade J.'s decision is the only possible one. Any other would be to award damages for loss caused by the death of a human being. Since Slade J.'s decision has been cited with approval and, in effect, followed by the Court of Appeal,[38] it is submitted that the weight of authority is in favour of the view that the damages are truly damages for loss of income.[39]

[33] (1879) 5 C.P.D. at p. 293. See also *Billingham* v. *Hughes* [1949] 1 K.B. 643 —overruled in *Gourley's* case, but on a different point. *Phillips'* case, as was *Billingham* v. *Hughes*, was concerned with a professional man paid by fees. For a similar case concerning a wage-earner see *Roach* v. *Yates* [1938] 1 K.B. 256.

[34] [1953] 1 Q.B. 617.

[35] " The damages are in respect of loss of life, not of loss of future pecuniary prospects." *Per* Lord Simon L.C. in *Benham* v. *Gambling* [1941] A.C. 157, 167.

[36] *Quantum of Damages in Personal Injury Claims* (1954), pp. 84 *et seq.*

[37] At p. 91.

[38] *Richards* v. *Highway Ironfounders* [1955] 1 W.L.R. 1049.

[39] Further support for this view is to be found in the cases in which the plaintiff continues to receive his wages although unable to work. (" Wages " does not include payments in lieu of wages such as a disability pension or a sum received under an insurance policy: *Payne* v. *Railway Executive* [1952] 1 K.B. 26; *Bradburn* v. *Great Western Railway* (1874) L.R. 10 Ex. 1.) In these cases it seems that a plaintiff cannot recover for loss of earnings,

Finally, it may be added that this view accords with that evidently taken by Parliament in the Law Reform (Personal Injuries) Act, 1948.[40] Section 2 (1) of that Act provides that in an action for damages for personal injuries "there shall in assessing those damages be taken into account, *against any loss of earnings or profits which has accrued or probably will accrue*," certain benefits under the National Insurance Acts.[41]

It is not suggested that this conclusion is the only possible one from the theoretical point of view, nor that it is necessarily the better one. All that is suggested for the moment is that the cases are more consistent with the view that the damages are damages for loss of income. In the interests of consistency, therefore, it would be right to adopt the solution proposed in the second minority view. If the views expressed above are correct, such a change in the law would be merely to correct a mistake in the Revenue law never actually considered by any court. As has already been stated, there is no authority for the rule that damages for loss of earnings are not taxable, and that rule is only law because *communis opinio facit jus*. An Act intended simply to "tidy up" the law could just abolish the rule. Whether this would, in practice, be the better solution will be considered after the case of wrongful dismissal has been discussed.

Wrongful Dismissal

The nature of the damages awarded in cases of wrongful dismissal can be dealt with quite shortly, for it is absolutely clear that they are calculated, subject to the rules about mitigation of damage, directly from the plaintiff's actual wages or salary. It is sufficient merely to refer to the well-known case of *Addis* v. *Gramophone Co.*,[42] where a business manager who was entitled to six months' notice was wrongfully dismissed. It was held that the damages should be "the salary to which the plaintiff was entitled for the six months . . . together with the commission which the jury think he would have earned had he been allowed to manage the business himself."[43] Nothing could be clearer than this.

The taxation of damages for wrongful dismissal was one of the matters considered by the Royal Commission on the Taxation of

though clearly his earning capacity is as much affected as if he had not continued to receive his wages: *Receiver for Metropolitan Police District* v. *Croydon Corporation*; *Monmouthshire County Council* v. *Smith* [1957] 2 Q.B. 154.

[40] 11 & 12 Geo. 6, c. 41.

[41] Italics added.

[42] [1909] A.C. 488.

[43] *Per* Lord Loreburn L.C. at p. 491.

Profits and Income,[44] and the members of that Commission had no doubt that such damages were damages for loss of income. "The basic idea is that the person compensated had a right, or an expectation approximating to a right, to earn future income by services, and something is paid to him to make up for his not remaining in a position to tender the services. The money received therefore is not only a fruit of the office or post which he held, but is directly related to the income which would have accrued to him if he had rendered his services."[45]

To Tax or Not to Tax

Evidently, therefore, the Commission regarded the rule of the Revenue law, that damages for wrongful dismissal are not taxable, as anomalous. "Though we recognise that this is one of those cases between capital and income in which a difference of degree has ultimately to be treated as a difference of principle, we recommend that payments by way of compensation for loss of office should henceforth be treated as taxable income."[46]

If this recommendation is accepted the result will be that *Gourley's* case will cease to apply to cases of wrongful dismissal, and the defendant will be liable for the gross amount of the plaintiff's loss. Since damages for wrongful dismissal are so clearly damages for loss of income, it is to be hoped that this solution will be adopted. So far as these cases are concerned, the second minority view is to be preferred.

The present writer feels very much greater difficulty with regard to the damages in personal injury cases. In the United States they are exempted from Federal Income Tax by a specific statutory provision,[47] and this exemption has been said to be "rooted in emotional and traditional, rather than logical, factors."[48] Whatever the formal basis for their exemption from tax in England, it may be supposed that the same is essentially true here. It is not at all an unattractive notion that an injured man should receive a substantial tax-free benefit, and there is much to be said, therefore, for the first minority view.

[44] Final Report. June, 1955. Cmd. 9474, paras. 242–252.
[45] *Ibid.*, para. 246.
[46] *Ibid.*
[47] Internal Revenue Code 1954 s. 104 (a) (2). The general rule in the United States seems to be that the wrongdoer must pay the damages in full. The plaintiff's liability to tax is not taken into account in their computation and the law is thus as it was thought to be in England before *Gourley's* case. Harper and James, *The Law of Torts*, Vol. 2, p. 1326; *Dempsey* v. *Thompson* 251 S.W. 2nd 42 (1952–53); *O'Donnell* v. *Great Northern Railway Co.* 109 F.Supp. 540 (D.C.Cal. 1953–54); *Runnell* v. *City of Douglas, Alaska* 124 F.Supp. 657 (D.C. Alaska 1954–55).
[48] Harnett, *Torts and Taxes* (1952) 27 N.Y.U.L. Rev. 614, 626.

As *Gourley's* case itself shows, however, the current of judicial opinion seems to be opposed to the idea of tax-free benefits to plaintiffs in personal injury cases. The damages are regarded as damages for loss of income and the plaintiff must receive no more than his net loss. It seems to follow, therefore, that here too the second minority view is to be preferred. The defendant should pay the gross amount of the plaintiff's loss and the plaintiff should be held accountable to the Revenue.

Conclusion

A variety of other points is made in the Law Reform Committee's Report, but space does not permit of their discussion here. In any case, it is submitted, most of these points would be answered if the damages were taxable in the plaintiff's hands.[49] The objection that this is to tax capital disappears once it is accepted that the damages are awarded for loss of income.

Arguments of a different kind have been advanced elsewhere for a revision of the law and for the taxation of damages for loss of earnings [50] and the present writer is only secondarily concerned with the latter point. He is also somewhat surprised to find himself arguing for additional taxation of any kind. The main point which it is sought to make in this article is that the existing law, founded on *Gourley's* case, involves the paradox of treating at one and the same time the same payment as both capital and income. This, surely, is an undesirable state of affairs?

[49] Thus, for example, the practical difficulties referred to in paras. 12–14 would disappear, though they would, perhaps, be replaced by difficulties in assessing the tax to be paid by the plaintiff. As to this see the Royal Commission's Report paras. 247–252. So also would disappear the point (para. 8 (d)) that under the existing law it may be cheaper to repudiate a contract of service than to perform it, and that this is contrary to public policy.

[50] *e.g.*, that under the existing law the defendant may escape a portion of his proper liability because the injured party "has got a wealthy wife or a large independent income" (Lord Keith in *Gourley's* case at p. 216), and that claims which would otherwise be liquidated or for a sum certain become unliquidated because the court has to assess tax liability "by the application of reasonable common sense" (Lord Goddard in *Gourley's* case at p. 210). Hall, *Taxation of Compensation for Loss of Income* (1957) 73 L.Q.R. 212. See also T. B. Smith 1956 S.L.T. 13 for the difficulties *Gourley's* case could cause in a case with a foreign plaintiff.

GIFT OF PART OF A DEBT

J. C. Hall

One can conceive of more exciting presents than a part of a debt; but a creditor is sometimes moved to make such an assignment. Suppose, for example, that he is owed £100 by X and desires to transfer the right to half of it to a friend. How can he do this?

The possible courses open to him will be considered under three heads: statutory assignment, equitable assignment, and a gift by other means than assignment.[1]

I. Statutory Assignment

In 1873 Parliament created a statutory method of transferring the right to a debt,[2] common law having stoutly refused to sanction such an interference with the personal nature of contracts.[3] This new provision was reproduced in section 136 of the Law of Property Act, 1925. The requirements are simple. If A wishes to assign to B a debt which X owes him he must do two things: he must sign a document stating that he assigns the debt to B (the document can be quite informal[4]), and he must give written notice of this to X.[5] The Act makes no mention of consideration and thus the statutory method is available for assignments by way of gift.[6]

But can it be used to assign merely a part of a debt? At first it was held by Darling J. that it could, provided the portion was ascertained.[7] But in *Forster* v. *Baker*,[8] the very next case in the Reports, Bray J. took a different view. He pointed out that if the creditor split the debt up into three or four parts the debtor might be faced with as many actions and thus "a great burden, an unnecessarily great burden, would be placed upon the debtor." For this reason he declined to construe the word "debt" in the

1 Much assistance in what follows has been derived from articles by Professor Bailey in 47 L.Q.R. 516 and 48 L.Q.R. 248 and 547; R. E. Megarry in 59 L.Q.R. 58 and 208; Professor Hollond in 59 L.Q.R. 129; and also from Dr. Marshall's *The Assignment of Choses in Action* (1950).

2 "or other legal chose in action"—Judicature Act, 1873, s. 25 (6).

3 The common law allowed two main exceptions: the Crown had a prerogatival right both to assign and to receive assignment of debts; and debts embodied in negotiable instruments were freely transferable.

4 *Re Westerton* [1919] 2 Ch. 104.

5 The actual requirement is that X shall be given notice, but not necessarily by A.

6 *Re Westerton, supra.*

7 *Skipper & Tucker* v. *Holloway* [1910] 2 K.B. 630.

8 [1910] 2 K.B. 636.

Act as including a part of a debt. The uncertainty produced by this conflict of authority lasted for a decade, and then in *Re Steel Wing Company*[9] the point arose again. A by deed assigned to B "an equal half part of the sum of £4,632 2s. 2d." which was owed him by the company, and gave the company written notice of this. The question was whether B was now a creditor of the company and so entitled to present a winding-up petition. The judge preferred to follow the second of the earlier decisions and held that this was not a valid statutory assignment. For if the assignees of various parts of a debt each acquired a legal right to sue in their own name this "might result in conflicting decisions being arrived at concerning such debt." (But no such objection arises in the case of an *equitable* assignment,[10] and thus as this assignment was valid in equity B was a creditor and could present his petition.) Finally the matter was put beyond doubt by the decision in *Williams* v. *Atlantic Assurance Company*.[11] Insured goods had been lost at sea and the owner assigned the right to part of the money due from the insurance company to the plaintiff. The Court of Appeal approved *Re Steel Wing Company* and held that this could not be a valid statutory assignment.

II. Equitable Assignment

Thus it is clear that the convenient statutory method of assignment is not open to the intending giver of part of a debt. Can he then resort to an assignment in equity?

From as early as the seventeenth century the Court of Chancery was prepared to enforce assignments of choses in action.[12] So for some two hundred years the law lagged behind equity in this field, until eventually the Judicature Act, 1873, introduced legal assignment. This, it might have been thought, would have marked the end of equitable assignment, which, having served its purpose, could now gracefully disappear. But such was not the case: in *Brandt's* v. *Dunlop*[13] the House of Lords confirmed that equitable assignment had survived undaunted to exist side by side with the statutory method as a valuable alternative. For though more cumbersome in operation, its scope is appreciably wider.

[9] [1921] 1 Ch. 349.
[10] Because, as will be seen, all persons interested in the debt must be made parties to an action so that the matter is adjudicated once and for all.
[11] [1933] 1 K.B. 81, described by the trial judge as the most unsatisfactory case he ever had to deal with.
[12] For early examples see *Perryer* v. *Halifax* (1677) Rep.t.Finch 299; *Squib* v. *Wynn* (1717) 1 P.Wms. 378.
[13] [1905] A.C. 454.

In considering equitable assignment it is imperative at the outset to distinguish sharply between the two categories of choses in action, *legal* choses, and *equitable* choses. Legal choses in action are those which can be recovered by action at law. Examples are an ordinary debt, a bill of exchange, and money due under an insurance policy. Equitable choses in action, sometimes known as choses in equity, are those which were enforceable only by means of an action in Chancery, though, of course, since 1875 the plaintiff can sue in any division of the High Court. Obvious examples of such choses are an interest in a trust fund and a legacy; others are an interest in a partnership and a share under an intestacy.

Both species of choses are assignable in equity, but different rules apply. Clearly Chancery was quite unhampered in making transferable those choses which fell within its own province, and thus the equitable assignment of an equitable chose could be simply effected, and the assignee could bring an action in his own name.[14] But it was less easy for equity to enforce an assignment of a legal chose, which the common law insisted still belonged to the assignor. In view of this the assignor as legal owner had always to be a party to an action for recovery of the chose, but if equity regarded him as having made an assignment, equity would compel him by means of a common injunction to allow the assignee to use his name for an action in the common law courts. And the difference of machinery largely survives: whereas the equitable assignee of an equitable chose can sue in his own name,[14] the equitable assignee of a legal chose must join the assignor as a party to the suit—as a plaintiff if willing or as a defendant if not.[15]

1. *Equitable assignment of an equitable chose*

The debt of which part is to be given away may be an equitable chose, such as money due from a trust fund or a legacy to which the donor is entitled. Here there is no difficulty.[16] In the first place it has long been settled that consideration is not necessary for the equitable assignment of an equitable chose. "Surely it must be competent," declared Knight Bruce L.J. in *Kekewich* v. *Manning*,[17] for the beneficiary "to make an effectual gift . . . by way of pure bounty, leaving the legal interest and title unchanged."

[14] But not if the assignment related only to part. This is dealt with below.
[15] *Performing Right Society, Ltd.* v. *London Theatre of Varieties, Ltd.* [1924] A.C. 1. But the joinder of an assignee will not be required by the court if the assignor has retained no interest and the debtor does not object: *Brandt's* v. *Dunlop, supra.*
[16] Assuming it is not a mere expectancy. This is discussed below.
[17] (1851) De G.M. & G. 176.

This was confirmed in *Voyle* v. *Hughes*.[18] Consols were held by trustees on trust for an admiral for life with remainder to certain relatives, and one of these made a voluntary assignment by deed of her share to a friend. The court held that this was neither a declaration of trust nor a mere contract to assign, but an actual conveyance, and therefore needed no consideration. "The actual assignment by deed of [an equitable interest] without any valuable consideration is not a mere agreement . . . but is an actual transfer of an equitable right. This puts it beyond the infirmity of an incomplete gift, or the case of a right resting merely in contract, which requires a valuable consideration to induce a Court of Equity to interfere." [19]

Secondly, the fact that part only of the equitable chose is being transferred will merely make a procedural difference in the event of an action to enforce the chose. Contrary to the general rule for equitable assignment of equitable choses, the assignor will have to be a party to any proceedings brought by the donee, so that the whole chose can be the subject of adjudication.

A recent example of the voluntary assignment of an equitable chose in parts is *Letts* v. *I. R. C.*[20] Members of the Letts family were partners in a firm which made diaries, and they decided to form a company and to sell the business to it in return for shares. Under the contract with the company Mr. Letts, senior, was entitled to receive a large block of preference shares and he later decided to give these to his three children. Accordingly in 1944 he wrote to the company with instructions to allot a third of the shares to which he was entitled to each child instead of to himself, but the company did not do so until 1945. In 1949 he died. Now gifts made within five years of a donor's death are (generally) subject to estate duty, and the shares were actually allotted to the children within this period; but the children argued that the gift had effectually been made by the letter of 1944, which was outside the five-year period. Their contention succeeded. The father's contractual right to have the shares issued to him was an equitable chose in action,[21] and his letter to the company instructing it to issue them to three others was "a direction to the company as a way of implementing his intention of making a gift, and so it operated as an equitable assignment." [22]

The intending giver of part of an equitable debt may therefore

[18] (1854) 2 Sm. & G. 18.
[19] *Per* Sir John Stuart V.-C. at p. 30.
[20] [1957] 1 W.L.R. 201.
[21] Because his remedy against the company would be the exclusively equitable one of specific performance.
[22] At p. 215.

be advised that he can make an equitable assignment of it; and in fact in such a case there is a choice of four different forms of assignment open to him.

First of all he can make a direct assignment to the donee—a conveyance of his equitable interest. This was the method used in *Voyle* v. *Hughes*.[23] No particular form of language is needed provided the meaning is clear[24]; but as this is "a disposition of an equitable interest," section 53 (1) (*c*) of the Law of Property Act, 1925, requires it to be in writing.

Secondly, he can declare himself a trustee of his equitable chose in favour of the donee. As an equitable chose usually, though not invariably, exists under a trust,[25] this will normally create a trust upon a trust, or what has been called in the United States a "sub-trust."[26] A declaration of trust of an equitable interest is not a "disposition" of it and no writing is needed; as Morris L.J. observed *obiter* in *Grey* v. *I. R. C.*,[27] "it is well established law that a declaration by parol is sufficient to create a trust of personal property."

His third course is to assign the equitable chose to a trustee to hold on trust as to part for the donee, and again this will normally create a trust upon a trust. This is clearly a "disposition" of his equitable interest and so writing will be required.

Fourthly, he can if he wishes direct the existing trustees to hold on trust from now on as to part for the donee. This is in some ways the most convenient of all and it is curious that until a year ago it had not been decided whether such a direction was required to be in writing. The point finally arose in *Grey* v. *I. R. C.*,[28] and in a somewhat roundabout way. Trustees were holding shares on trust for X, and in February, 1955, X orally directed them thenceforth to hold on trust for his grandchildren. In March the trustees executed a document declaring that they held on such a trust. Now if a document *creates* a trust in favour of someone it must bear *ad valorem* stamp duty,[29] but when the Revenue claimed that the document executed in March should

[23] *Supra*.
[24] "It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain": *Brandt's* v. *Dunlop*, *supra*, *per* Lord Macnaghten at p. 462. The case concerned a legal chose, but this statement applies to both.
[25] An example of an equitable chose which exists without a trust is a contractual right to have shares allotted, as in *Letts* v. *I. R. C.*, *supra*.
[26] American *Restatement* (1935).
[27] [1958] 3 W.L.R. 45, at p. 60.
[28] *Supra*.
[29] As a "conveyance or transfer operating as a voluntary disposition *inter vivos*" within Finance (1909–10) Act, 1910, s. 74.

have been so stamped the trustees replied that the document was quite superfluous as they had already been holding on such a trust since the oral direction to them in February. But was the oral direction to the trustees to hold on trust for someone else valid, or was it "a disposition of an equitable interest" and therefore ineffective in the absence of writing? By a majority (Lord Evershed M.R. dissenting) the Court of Appeal held that a direction to a trustee is a "disposition" and so must be in writing. "The word 'disposition' is a word of wide signification . . . [X's] purpose and object when he gave his oral direction was to deprive himself immediately and irrevocably of his subsisting personal beneficial interest so that others could and should become beneficially entitled. . . . He informed his trustees that they should no longer hold for him but should hold on the substituted trusts which he declared. I cannot resist the conclusion that this was a purported 'disposition' by him of his interest."[30]

Thus three out of the four methods open to the donor of an equitable chose require the use of writing.

It may be mentioned that there is a fifth method of making an equitable assignment of an equitable chose—namely, by means of a contract for its assignment made between the assignor and assignee. But of course consideration is needed here and thus this method is not relevant for the purpose of a gift. This is illustrated by *Re McArdle*,[31] where five children were beneficiaries under a will. Another person had carried out alterations to a house which was part of the property left by the deceased, and the five children signed a document addressed to her which read "in consideration of your carrying out certain alterations . . . we the beneficiaries hereby agree that the executors shall pay to you from the said estate when distributed £488." The Court of Appeal held that this document purported to be a contract to assign and not a direct assignment. As, therefore, it needed consideration to support it and there was none here (for the consideration was past), it was of no effect. Had it been drawn as a direct assignment, such as "we the beneficiaries hereby assign to you . . .", it would have succeeded.

Finally, the donor must remember that one other step is essential, and a further one still desirable. It was held by the Court of Appeal in *Re Hamilton*[32] that an assignment is not effective unless notice is given to the assignee. The case itself

[30] *Per* Morris L.J. at p. 61.
[31] [1951] Ch. 669.
[32] (1921) 124 L.T. 737.

concerned an assignment by way of direction to the existing trustees and "it was admitted that this would not be a good assignment without communication to [the assignee]."[33] Now this must clearly be the rule for a direct assignment, but one would have thought that if a trust is created in favour of the donee, his knowledge of this would be immaterial. That, it appears, is the rule regarding trusts of legal interests,[34] and it may well extend, it is suggested, to a trust of an equitable chose.

Notice to the trustees[35] themselves of the assignment is not essential; thus a letter of assignment from a beneficiary to a donee is effective by itself. But it is desirable that notice should be given, either by assignor or assignee, for the following reasons: (1) if more than one assignment is made, priority depends on the giving of notice to the trustees under the rule in *Dearle* v. *Hall*[36]; (2) it prevents the trustee paying the assignor; (3) it prevents further cross-claims arising; (4) it safeguards the assignee in the event of the assignor's bankruptcy.[37]

2. *Equitable assignment of a legal chose*

It is more likely perhaps that the debt which is the subject of this gift is legal and not equitable. As already mentioned equity was also prepared to enforce assignments of legal choses by making the assignor lend his name to the proceedings, but the question which must now be considered is whether equity will enforce a *voluntary* assignment of a legal chose in action. Though much has been written on this vexed problem confusion still reigns, and Mr. R. E. Megarry has been moved to call for "a monograph to end all monographs on the subject."[38]

It can first of all be stated confidently that consideration is always necessary for the equitable assignment of a debt which *may* arise in the future.[39] A mere expectancy cannot be voluntarily assigned; but if value is in fact given for the assignment it operates as a contract to assign, and if and when the property is received the equitable interest in it thereupon passes to the assignee.

[33] *Per* Lord Sterndale M.R. at p. 739.
[34] *Middleton* v. *Pollock* [1876] 2 Ch. 104 proceeded on this assumption.
[35] Or whoever else is responsible for the chose if it does not arise under a trust.
[36] (1828) 3 Russ. 1.
[37] See Bankruptcy Act, 1914, s. 38, and *Rutter* v. *Everett* [1895] 2 Ch. 872. But "debts due or accruing due to the bankrupt in the course of his trade or business" are perhaps unlikely to include many equitable choses.
[38] 59 L.Q.R. 62. No such claims are made for what follows, this being merely a diffident attempt to summarise the present position.
[39] This is true of both legal and equitable choses. A statutory assignment is not possible either, as only existing debts, etc., are included under s. 136 of the L.P.A., 1925.

This was laid down by the House of Lords in *Tailby* v. *The Official Receiver.*[40]

But what of an existing legal debt? It is generally said that consideration is not necessary provided the gift is complete; otherwise the gift fails because "Equity will not perfect an imperfect gift." But this merely leads to the question: when is such a gift complete and perfect? It is therefore necessary to examine the several ways in which an equitable assignment of a legal chose can take place.

From early times equity has been prepared to enforce assignments of a legal chose in action on one of two alternative grounds: (a) because the owner has contracted to assign it or (b) because a trust has arisen. Any equitable assignment of a legal chose must therefore be brought under one of these two heads.[41]

(a) *Contractual.* An ordinary assignment for value (which had no effect at common law) would be regarded in equity as a contract to allow the assignee to use the assignor's name to recover the chose, and thus equity would compel him to lend his name to the action. But no such contract could be implied and thus no assistance be derived from equity unless consideration had been furnished. This was laid down at an early stage[42] and is still true, though the meaning of consideration in this context has undergone some change. In the eighteenth century natural love and affection (termed by equity "good consideration") sufficed,[43] but *Dillon* v. *Coppin*[44] in 1839 shows that by then valuable consideration in the legal sense was necessary. Notice to the assignee is naturally a further requirement of an assignment which operates as a contract.[45]

It is apparent therefore that a so-called direct assignment, operating in equity by way of contract, is not open to the creditor who wishes to make a mere gift of his debt.

(b) *Trust.* The other medium, that of the trust, can however be employed to meet his needs. For it is a general principle applying to all forms of property that once a trust is constituted the beneficiary has a good right in equity irrespective of whether he has given value. "Every *cestui que trust*, whether a volunteer or not

[40] (1888) 13 App.Cas. 523. An assignment for value of "all the book debts due and owing or which . . . may become due and owing."

[41] The distinction is not always regarded: thus (a) is sometimes said to create a trust (*e.g.*, *per* Thurlow L.C. in *Legard* v. *Hodges* (1792) 1 Ves.Jun. 477), but this is misleading. And cases which must fall within (b) do not always make it clear that they depend on a trust.

[42] *e.g.*, *Earl of Suffolk* v. *Sir Richard Greenvill* (1631) Nelson 15; *Crouch* v. *Martin* (1707) 2 Vern. 595.

[43] See, *e.g.*, *Wright* v. *Wright* (1749) 1 Ves.Sen. 410.

[44] (1839) 4 My. & Cr. 647. A daughter who had been given shares by her father in consideration of natural love and affection was treated as a volunteer.

[45] *Morrell* v. *Wootten* (1852) 16 Beav. 197.

. . . with or without consideration, is entitled to the aid of a Court of Equity in order to avail himself of the benefit of the trust." [46]

There are four possible ways in which the medium of the trust can be employed for a voluntary assignment of a legal chose. The first three involve a deliberately constituted trust, and although the fourth does not, it seems clear that it nevertheless involves the creation of a trust. These will be considered in turn, and the fourth in some detail.

1. The first is where the *assignor declares himself a trustee* of the debt in favour of the assignee. Trusts of debts have been enforced by Chancery since the seventeenth century,[47] and it is quite clear that if the creditor effectively makes himself a trustee of the debt the trust will be binding on him irrespective of whether the beneficiary has given value.

But the creditor must in fact make himself a trustee. How is he to do this? Equity has never insisted on formal language for the creation of a trust, and all that is required is that an owner should make it quite clear that he is constituting himself a trustee. The principle was stated by Sir George Jessel M.R. in *Richards* v. *Delbridge* [48] as follows: "he need not use the words 'I declare myself a trustee,' but he must do something which is equivalent to it and use expressions which have that meaning." No writing is necessary as the provision in section 53 (1) (*b*) of the Law of Property Act, 1925, requiring that a declaration of trust must be "manifested and proved by some writing" applies only to "land or any interest therein." Here then is a simple method of making the desired gift. The creditor can declare himself a trustee for the donee of that part of the debt which he wishes to give. Nothing more is required, for when a trust is declared there is no need, it seems, to inform the beneficiary.[49]

A further question which arises is whether a donor who has not expressly declared himself to be a trustee can ever be said to have done so impliedly by his conduct. On the whole the courts have shown reluctance to deduce implied declarations of trust, though a few were established in cases in the first half of the nineteenth century.[50] But "the court requires clear and distinct evidence of a declaration of trust in favour of the donee," [51] and in particular it has steadfastly refused to hold that a declaration of trust should

[46] *Lechmere* v. *The Earl of Carlisle* (1735) 3 P.Wms. 211.
[47] An early example is *Pritchard* v. *Langher* (1690) 2 Vern. 198. The debtor knew of the trust but paid the trustee. It was held he must make a further payment to the beneficiary.
[48] (1874) L.R. 18 Eq. 11 at p. 14.
[49] This appears from *Middleton* v. *Pollock* [1876] 2 Ch. 104.
[50] *Ex p. Pye* (1811) 18 Ves. 140 is the first of several examples.
[51] *Per* Sir John Romilly M.R. in *Bentley* v. *Mackay* (1851) 15 Beav. 12 at p. 19.

be implied from the owner's conduct where he has sought to transfer the property outright. This is logical; for if the owner has attempted to divest himself of the whole of his interest in favour of another person, it can hardly be maintained that he has shown an intention to retain the legal title and hold the property on trust. And this is so whether his intention was to pass the whole interest (legal and equitable) to the same person, or to pass the legal ownership to one and the equitable ownership to another (that is to create a trust but by making someone else a trustee). The authorities are well known and emphatic. In *Antrobus* v. *Smith* [52] the owner of shares in a company wished to give them to his daughter, but instead of following the correct procedure for doing so he merely wrote a note on the back of the receipt for his subscription for the shares stating that he transferred them to her. This could not make her the legal owner; and because the father's intention was clearly to make an out-and-out gift his action could not be construed as an implied declaration of trust. In *Milroy* v. *Lord* [53] the owner of shares in a bank attempted to transfer them to Lord to hold on trust for Milroy. But instead of procuring an entry in the books of the bank, which alone would have passed the legal ownership to Lord, he executed a deed and handed over the share certificate. The Court of Appeal held that a declaration of trust could not be implied because something quite different, a transfer to someone else as trustee, had been contemplated. "If it is intended to take effect by transfer the court will not hold the intended transfer to operate as a declaration of trust." [54]

2. The second method whereby an equitable assignment of a legal debt may be made, it is said,[55] is if the *creditor instructs the debtor to hold the debt on trust* for the assignee. There are two difficulties here. First it is a little puzzling to see how the debtor can thereby become a trustee, for there is no specific property in his hands which is made the subject of a trust. The debt is the property of the creditor, not the debtor. Dr. Marshall's explanation is that the creditor releases the debt to the debtor but on the condition that he holds it on trust for the assignee. Now it is apparent that an agreement to release a debt on condition it is paid to a third person can constitute a contract between the creditor and the debtor, but for an assignment to take place the right to the debt must be vested in the assignee. He will have such a right (in equity) if specific property is held on trust for him, but is a released debt property at all? It is submitted that it is not, and that a

[52] (1806) 12 Ves. 39.
[53] (1862) 4 De G.F. & J. 264.
[54] *Per* Turner L.J. at p. 274.
[55] *e.g.*, by Dr. Marshall at p. 98.

better analysis of this situation is that the creditor, in instructing the debtor to pay another, is impliedly making himself a trustee of the debt. The second method thus becomes simply an instance of the first.

There is some support for this interpretation in *McFadden* v. *Jenkyns*,[56] the example generally cited for this type of assignment. The defendant owed X £500 and X orally directed him to hold the debt on trust for the plaintiff. The defendant "accepted the trust" and paid the plaintiff £10 on account. But when X died his executors claimed the money. On appeal Lord Lyndhurst L.C. said that X "had impressed, I think, a trust upon the money which was complete and irrevocable. It was equivalent to a declaration by [X] that the debt was a trust for the plaintiff."

Assuming that the debtor can thus become a trustee, the further difficulty is whether the trust can be forced on him. If his consent is needed, this method cannot be termed an assignment at all, because an assignment must operate independently of the debtor's consent. Now it is a long-standing common law principle that a creditor can insist on payment to anyone he chooses.[57] But if we are to say that the debtor is himself to become a trustee this must surely involve his agreement, because with the exception of a constructive trust (which would not seem to arise here) a person cannot be forced to become a trustee.[58]

It seems unlikely therefore that an ordinary debtor can be turned into a trustee, and less likely still that if he can his consent is unnecessary. Therefore this second method is of very doubtful validity and cannot be recommended to our donor.

3. The third method of equitable assignment by way of gift is by *transfer of the legal ownership of the debt to trustees* on trust for the assignee.[59] The correct steps must naturally be taken to vest the legal ownership in the trustees. It will be remembered that in *Milroy* v. *Lord* (1862) the settlement failed because the legal right to the shares was not effectually transferred to the trustees, the settlor having chosen to adopt a procedure different from that prescribed by the company; and the Court of Appeal declined to construe the intended transfer to trustees as a declaration of trust.

[56] (1842) 1 Hare 458. On appeal 1 Ph. 153.

[57] See *per* Bayley J. in *Hodgson* v. *Anderson* (1825) 3 B. & C. 842 at p. 853.

[58] In *Harding* v. *Harding* (1886) 17 Q.B.D. 442 (discussed below) the court held that one ground on which the assignment succeeded was that a trust had been created, but they stressed that the trust had been "accepted" by the trustees and seem to have regarded this as essential. See *per* Wills J. at p. 445 and *per* Grantham J. at p. 446.

[59] See for example *Bentley* v. *Mackay* (1851) 15 Beav. 12. (The case was mainly concerned with whether there had later been a declaration of trust by the beneficiary.)

The donor of part of a debt can employ this method with confidence, because he can make a statutory assignment of the whole debt to trustees on trust as to the desired part for the donee and as to the remainder for himself.

4. The development by Chancery of the fourth method was characterised more by benevolence than by logic. It must be described at some length. In the days before the Judicature Act, 1873, it was only certain choses in action (such as shares) which were capable of being transferred at law. No general right to assign existed. Thus it was in most cases impossible for the donor to transfer the legal right to a trustee, under the third method.[60] Consequently to overcome this difficulty equity evolved a curious rule: if the *donor does all that he can possibly do to transfer ownership* of the chose to the trustee, the settlement is binding on him.

The leading case of this doctrine is *Fortescue* v. *Barnett* in 1834.[61] It concerned an insurance policy, a chose in action which did not become legally assignable until the Policies of Assurance Act, 1867. The donor, whose life was insured, wished to transfer the policy to trustees on trust for his sister and her children. He therefore executed a deed stating that he assigned the policy to the trustees and handed this deed, but not the policy, to them. No notice was given to the insurance company. The question later arose of whether the assignment was effective and binding on him. It was held that it was, on the grounds that he had done all he could do to convey the title to the trustees. The question, said Sir John Leach M.R.,[62] was simply "whether any act remained to be done by the grantor which, to assist a volunteer, this court would not compel him to do." And here, he held, "no act remained to be done to complete the title of the trustees."

Another example is *Re Patrick*.[63] Patrick wished to make a voluntary settlement of some debts which were owed him, and he executed a deed purporting to assign them to trustees for the benefit of his wife and sisters. The deed authorised the trustees to sue for the debts. The debtors were not informed and they later paid Patrick, who then died. Was his estate liable to the trustees for the money received from the debtors? The Court of Appeal held that it was. This amounted, said Lindley L.J., in the leading

[60] However he could give the trustee the legal right to sue in his name by means of a power of attorney. But this was normally revoked by his death and so would be useless for example for the gift of a life insurance policy.
[61] (1834) 3 My. & K. 36.
[62] At p. 42.
[63] [1891] 1 Ch. 82. The events occurred before the Judicature Act, 1873, came into effect.

judgment, "to a complete and not an incomplete assignment of the debts." [64] The settlor was therefore under an obligation to hand over to the trustees the money paid to him by the debtors. "This was decided in *Fortescue* v. *Barnett*."

It was therefore established that as regards choses incapable of legal assignment, an attempt to transfer the ownership to trustees would be binding on the donor if he had done all he could do to vest his title in them.[65]

This being the case it followed that the result would be the same if the donor did all he could to transfer his ownership not to trustees for the donee (as in the early cases), but direct to the donee himself; and accordingly under this fourth method an assignment will be upheld in equity if the donor purports to make an out-and-out transfer to the donee, provided he does everything that is necessary for him to do according to the nature of the chose.[66]

Such, it appears, is the rule; but it bristles with difficulties. It is proposed first to consider the rule in relation to the Judicature Act, 1873, and examine the cases where it has been applied since the Act; secondly to find out what exactly the donor is required to do; and thirdly to discover if possible the underlying principle.

The doctrine itself arose, as has been seen, in the days when it was impossible to make a legal assignment of most choses in action at all, and was originally confined to such choses. Why then has it any further validity now that statute [67] has provided such a method? Alternatively, assuming the doctrine does survive, does not its very application render it superfluous? For it insists that the assignor must do all that is necessary to effect the transfer, and surely he can hardly be said to have done so unless he has actually followed the statutory procedure which will ensure a transfer at law.

The cases which follow show, however, that (despite the destruction of its original *raison d'être*) the doctrine has survived the innovations of statute; and that it does not require the assignor who seeks to rely on it to have complied with the statutory procedure. Surprisingly therefore the rule still exists, and so with this double extension: that it is no longer confined to those choses incapable of legal assignment, and that it does not require the assignor to have done absolutely everything to effect the transfer

[64] At p. 87. Rather curiously he said that this was "within the principle of *Kekewick* v. *Manning*" (*supra*) but that was a decision on the assignment of an equitable chose.

[65] The exact requirements are considered below.

[66] See Salmond & Winfield, *Law of Contract*, p. 408.

[67] Judicature Act, 1873, s. 25 (6); Law of Property Act, 1925, s. 136. Can we not "return in peace to the general principles"? asks Prof. Bailey in 48 L.Q.R. at p. 569.

of the chose. But it is apparent that the cases where it has been applied since the Judicature Act, 1873, can hardly be described as resounding and conclusive authorities in its favour.

It would perhaps be dangerous to rely at all on *Re King*,[68] where the doctrine was applied in very unconvincing circumstances. The owner of some insurance policies wrote a letter to a trustee of a previous settlement saying he was "desirous of making a settlement" upon his children of the policies, and undertaking to assign them to him and another trustee (not yet named). Two days later he wrote a second letter which referred to the first as "the formal letter of assignment previous to a deed and as binding." Nothing more was done. But Hall V.-C. brushed aside a powerful argument[69] that this was only an expression of intention to make a future settlement, and held that there was a complete assignment within the principle of *Fortescue* v. *Barnett*.[70] But as the contemplated deed was never executed nor any notice of the letters given to the insurance companies, the decision seems difficult to support.

Harding v. *Harding*[71] is a rather more satisfactory case though the assignment succeeded also for other reasons. The executors of James Harding deceased sent a statement of account to George, a legatee, showing a balance due to him of some £29. (By stating an account the executors rendered themselves liable to an action at law and thus this debt became a legal chose.) George wrote on the document "I hereby instruct the [executors] to pay to my daughter Laura the balance shewn in the above statement, less the £10 received by me," signed it, and sent it to Laura, who later informed the executors. Could Laura claim the money? It was held that she could, and on three grounds. First, this was a valid statutory assignment and thus passed the legal ownership of the debt. Secondly, "if it is to be regarded as an equitable assignment [George] has done all that he could to make it complete."[72] Thirdly, it appeared from the correspondence that the executors had acknowledged that they held on trust for Laura. It was quite unnecessary therefore to invoke the doctrine in these circumstances, but at least the case shows that the court did not regard it as dead.

The decision also in the next case did not depend solely on the doctrine. *Re Griffin*[73] concerned the assignment of a deposit account at a bank. The owner wrote on the deposit receipt[74] the

[68] (1880) 14 Ch.D. 179.
[69] Described by Prof. Bailey as "unanswerable" in 48 L.Q.R. 547 at p. 563.
[70] *Supra*.
[71] (1886) 17 Q.B.D. 442.
[72] *Per* Wills J. at p. 445.
[73] [1899] 1 Ch. 408.
[74] Which was not a negotiable instrument.

words " Pay my son," and handed it to him saying " Here you are, my lad. This is yours." Notice was eventually given to the bank, though after the father's death. Byrne J. said: " The donor appears to me to have done everything required to be done by him necessary to transfer the debt or fund to the defendant," [75] and he therefore held that this was a good equitable assignment. He also decided the case on the further ground that as the son had been appointed executor of his father's will the gift was in any event perfected by the principle in *Strong* v. *Bird*.[76] It has also been pointed out by Professor Bailey [77] that the assignment here did in fact satisfy the statutory requirements, though the judge did not mention this.

For the first forty years of this century, the doctrine does not appear to have formed the basis of any reported decision,[78] and in *Re Westerton* in 1919 [79] Sargant J., in an *obiter dictum*, denied its existence. But it has not been allowed gently to wither away, for in 1942 it seems to have again been pressed into service in *Holt* v. *Heatherfield Trust, Ltd.*[80] X owed a sum of money to Y and Y made a written assignment of the debt to the plaintiff. But then the defendants, who were creditors of Y, proceeded to garnishee the debt and served the appropriate garnishee notice on X. The next day X received notice from the plaintiff of the assignment of the debt to him. Now the defendants could not garnishee the debt if Y had already transferred his ownership of it to the plaintiff. The plaintiff therefore had to show that the assignment to him was effective before the garnishee order, and thus before receipt by the debtor of the notice of the assignment. Could he rely on a statutory assignment? This requires that " express notice in writing has been given to the debtor " and so, it was held, a statutory assignment cannot take place until the debtor has received the notice,[81] which was too late for the plaintiff's purposes in this case.

The plaintiff therefore had to show that a good equitable assignment took place at the outset when Y made his written assignment to him. Now if this were an assignment for consideration no difficulty would arise because (as seen above) equity has always regarded such an assignment as valid, operating by way of a contract. Thus the plaintiff would immediately have received the

[75] At p. 412.
[76] (1874) L.R. 18 Eq. 315.
[77] 48 L.Q.R. 565.
[78] It was urged on the court in *Re Williams* [1917] 1 Ch. 1, but it was held that only a revocable mandate and not an assignment was intended.
[79] [1919] 2 Ch. 104 at p. 111.
[80] [1942] 2 K.B. 1.
[81] Professor Hollond has suggested that the notice to a debtor should be effective from the time of posting: 59 L.Q.R. 131.

equitable right to the debt and the defendant's garnishee order would have been too late. Was there consideration here? In fact the assignment was made in part payment of an existing debt; but (without actually deciding the point) Atkinson J. seems to have had grave doubts whether this constituted consideration. He conceded that forbearance to sue for the debt could do so, but he does not seem to have taken into account that such a forbearance can be presumed [82]; and although, as Professor Hollond and Mr. Megarry have pointed out, an antecedent debt has been regarded since the earliest times as consideration for an assignment,[83] Atkinson J. treated the case on the basis that the assignment was voluntary.

There could be no question therefore of an equitable assignment by way of contract. Nevertheless it was held that the written assignment from Y to the plaintiff was effective in equity when made. By giving notice to the debtor the assignee could make himself legal owner of the debt in accordance with the statutory provisions, but "absence of notice does not affect the efficacy of the transaction as between the assignor and assignee. Until notice be given the assignment is an equitable assignment, but it is an assignment which requires nothing more from the assignor to become a legal assignment."

None of the *Fortescue* v. *Barnett* line of cases were cited by the learned judge, yet it must surely be on that doctrine (as extended) that his decision rests. For by treating the case as one of voluntary assignment he excluded the possibility of an assignment operating by way of contract, and there was no question of a declaration of trust in any form by the assignor. Thus Atkinson J. must have founded himself (as indeed appears from the language of his judgment) on the fact that the assignor had done all that he could to transfer the debt.

There are two further questions to be asked in connection with this fourth method of voluntary equitable assignment—the doing of all that the donor can possibly do to transfer the chose. The first is this: just what is the assignor required to do? It would seem, on the authority for example of the Court of Appeal decision in *Re Patrick*,[84] that if he has executed a deed assigning the debt (whether to trustees or direct to the assignee), this will suffice, even though he has not notified the debtor, and he will be bound. This must surely remain true despite the Act because, as Professor Hollond has pointed out,[85] the mere fact that statute has now

[82] See the dictum to this effect by Fletcher Moulton L.J. in *Glegg* v. *Bromley* [1912] 3 K.B. 474 at p. 487.
[83] 59 L.Q.R. 129 and 208.
[84] *Supra.*
[85] 59 L.Q.R. 133.

given legal effect to an assignment in writing (with notice) should not deprive a deed, which is a superior instrument, of its existing effect.

It would seem further, on the authority of *Harding* v. *Harding*, *Re Griffin* and *Holt* v. *Heatherfield Trust, Ltd.*, that a mere written assignment of a debt communicated to the assignee will be sufficient. The fact that by giving notice to the debtor the assignment could be made effective at law does not prevent its taking effect at once in equity. No particular language is needed: "to operate as an equitable assignment no particular form of words is required in the document," said Byrne J. in *Re Griffin*.[86] But a present intention to assign must be shown and not merely an intention to assign in the future.

It does not appear that an oral assignment can be effective under this head.[87]

Perhaps therefore as regards debts one can re-write the requirements of the fourth method and, instead of speaking enigmatically of the donor having to do all that he can possibly do, say simply that he can make a voluntary assignment of an existing debt in equity if he expresses such an intention in a deed or simply in writing, to the knowledge of the assignee.

The last question is to discover the precise principle on which equity intervenes in this fourth type of voluntary assignment. There being no consideration present it cannot be on the basis of contract and a trust must therefore have arisen. Yet there has been no express declaration of trust and it is well established that equity will not construe an attempted gift by another method as a declaration of trust.[88] The trust therefore is neither expressed nor implied. Perhaps then it falls into the category of a constructive trust. Such a trust does not depend on intention but on obligation, being imposed by equity in certain cases in the interest of good conscience. An intervention here on such grounds would demand a rather more tender conscience than seems normally to be required by equity for the raising of a constructive trust. However it seems that once a donor has committed himself by his deed or writing, he is thereupon under an obligation in equity to lend his name to proceedings for recovery of the chose by the donee, and thus to that extent may perhaps be termed a constructive trustee. Certainly there is no other recognised category to which such a trust can belong.

[86] *Supra*, at p. 412.
[87] An oral assignment was upheld in *Tibbits* v. *George* (1836) 5 A. & E. 107. But this was made for consideration and so operated contractually.
[88] *Milroy* v. *Lord*, *supra*.

Finally, before leaving this curious doctrine, it is of great interest to notice that in two recent cases concerning gifts of shares a principle has been applied which, if not identical with, is at least closely analogous to, the one under discussion. A share in a company is not of course a debt, but is a chose in action which has always been transferable by special statutory procedure, namely [89] in the manner provided by the articles of the company.[90] This must include registration in the company's register of members before the legal ownership can pass.[91]

Both cases by a coincidence were called *Re Rose*.[92] As the point at issue was substantially the same in each case it will be sufficient to deal with the second alone. Mr. Rose decided to give ten thousand shares to his wife. He executed the appropriate transfer form and handed it and the share certificate to her. At that point he had done all that he could do to divest himself of the ownership. There was some delay however before the company registered the transfer and thereby made his wife legal owner of the shares. Mr. Rose subsequently died on a date which was less than five years after the registration but more than five years after the handing over of the documents. The question of whether estate duty was payable on the shares turned therefore on whether Mrs. Rose became owner in equity when she received the documents. The Court of Appeal held that she did.

The Crown argued on the basis of *Milroy* v. *Lord* that if a document is intended to operate as a transfer it cannot in any respect take effect by way of trust. "In my judgment," said Lord Evershed M.R.,[93] "that statement is too broad and involves too great a simplification of the problem; and is not warranted by authority." *Milroy* v. *Lord* itself could be distinguished because the wrong form of transfer was used,[94] but here the donor had done all in his power to divest himself of the shares and had complied strictly with the procedure prescribed by the company's articles. He therefore became at that point a trustee for his wife pending her registration as legal owner.

It is surprising that no mention was made of the authorities discussed above, because the principle applied in *Re Rose* is strikingly similar. However here the donor had literally done everything which he could do, and the conferring of the legal title on the donee was as a result the exclusive responsibility of the

[89] This is confined to cases of companies registered under the Companies Acts.
[90] Companies Act, 1948, s. 73. [91] s. 26.
[92] [1949] Ch. 78; [1952] 1 Ch. 499.
[93] At p. 510.
[94] Similarly *Re Fry* [1946] Ch. 312 where Treasury consent to the transfer was necessary under the Defence Act, 1939, and had not been obtained before the donor died.

company. One notes with interest that the Court of Appeal have confirmed that a document which purports to transfer ownership of a chose in action but does not do so at law can create a trust in favour of the transferee. This would seem to corroborate the view that the principle of the *Fortescue* v. *Barnett* line of cases does in fact depend on the creation of a trust.

Such then are the various methods of equitable assignment of a legal chose in action, and the result is that our donor of part of a debt has three choices [95]:

(1) he can declare himself a trustee for the donee as to part;

(2) he can legally assign the whole debt (by the statutory method) to trustees to hold on trust as to part for the donee;

(3) (probably) he can make a direct assignment of the part of the debt to the donee by deed or writing and thereby enter equity's anomalous class of donors who have done all that they can do.

Notice to the assignee is not actually necessary except under (3). Notice to the debtor is not essential, but is very desirable for the same reasons as were mentioned above [96] in discussing equitable assignment of equitable choses.

III. Gifts Without Assignment

Should he not wish his donee to rely on the assistance of equity, is any other course open to the donor? Common law as has been seen did not normally recognise assignments of choses in action, but nevertheless there were two useful methods of circumventing this difficulty without resorting to equitable jurisdiction; and both remain possible today.

1. In the first place the owner of a debt can give a power of attorney (even orally) to another to sue in his name, and by appropriate wording the donee can be authorised to keep the money he recovers from the debtor. If it is thought that the debtor will be happy to pay his debt, the donee can be given a power of attorney simply to collect and retain it.[97] But a power of attorney is by nature revocable, and furthermore is automatically revoked by death; and although exceptions have been developed where the power is treated as irrevocable *inter vivos*, these have never extended, it appears, to a power of attorney given without consideration. Until he has actually recovered the debt the donee will therefore be dependent on the donor's remaining alive and of the same intention.

[95] Assuming the second of the four methods described above was rightly rejected.
[96] See *ante*, p. 105.
[97] See *Re Bowden* [1936] Ch. 71 *per* Bennett J. at p. 74.

What is more, it would not seem possible to give a power of attorney to sue for part of a debt only, as this would place the debtor in the unfair position of being liable to two creditors, and of exposure to more than one action. It was for this reason, it will be recalled, that the statutory mode of assignment was held to be inapplicable to a part of a debt,[98] and the same objection must have applied to the employment of a power of attorney in such a case.[99]

2. There is another common law method of transferring one's right to a debt, which is not an assignment because it involves the creation of a new debt in place of the old. It has grown out of novation. Now a novation is the substitution of a new contract for an existing one, as where A owes a sum of money to B, and A, B and C all agree that instead he shall owe the same sum to C. While it is clear that to constitute a genuine novation a triple agreement is necessary, a rule has grown up that the court can dispense with such an agreement, and allow C a remedy in quasi-contract provided only that A, the debtor, has undertaken to pay him.[1]

In *Griffin* v. *Weatherby*[2] X owed money to the plaintiff but was himself owed money by the defendant (as liquidator of a company). X therefore sent a document to the defendant requesting him to pay £600 to the plaintiff, and the defendant replied that he would do so. Was he then liable to the plaintiff? Lush J. treated X's document as a bill of exchange which had been accepted by the defendant, but Blackburn J. also held the defendant liable on this further ground: "where a person transfers to a creditor on account of a debt . . . a fund actually existing or accruing in the hands of a third person; and notifies the transfer to the holder of the fund, although there is no legal obligation on the holder to pay the amount of the debt to the transferee, yet the holder of the fund may, and if he does promise to pay the transferee, then that which was merely an equitable right becomes a legal right in the transferee, founded on the promise, and the money becomes a fund . . . payable to the transferee and . . . an action for money had and received to the use of the transferee lies at his suit against the holder."[3]

[98] *Forster* v. *Baker*; *Re Steel Wing Co.*, *supra*.

[99] This objection does not arise in the case of an equitable assignment because the assignor is made a party to the action and so there is one adjudication on the whole debt.

[1] *Williams* v. *Everett* (1811) 14 East 582 makes it clear that this promise is essential.

[2] (1868) L.R. 3 Q.B. 753.

[3] At pp. 758, 759. The principle was derived from *Walker* v. *Rostron* (1843) 9 M. & W. 411.

Apart from the alternative ground of the decision two limitations of this case may be noted. First it was not one of gift. Second, there was a definite fund in the hands of the defendant of which perhaps by his promise he became a trustee for the plaintiff.

But neither consideration nor a fund of any sort were present in the recent case of *Shamia* v. *Joory*.[4] This concerned three citizens of Iraq of whom two, the plaintiff and defendant, were working in England. The third, named Yousuf, was owed over a thousand pounds by the defendant, and he requested the defendant to pay £500 of this debt to the plaintiff (who was Yousuf's brother). The defendant wrote to the plaintiff undertaking to send him the £500. But he failed to do so, giving as his explanation that he had later ceased to be indebted to Yousuf. The plaintiff sued him for money had and received to his use, and succeeded. Barry J. held that the absence of consideration was immaterial, and that the plaintiff, as recipient of a gift of part of the debt, acquired a legal right to it as soon as the defendant had promised to pay him. It had been argued that the principle in *Griffin* v. *Weatherby* could not apply as there was never any specific fund in the hands of the defendant to which his promise related. But the court held that the principle does not depend on the existence of a fund, but applies whenever a debt is owed, and the debtor makes a promise to pay. This naturally rules out any explanation of the principle in terms of a trust.

A legal remedy in quasi-contract will therefore arise in favour of a third person to whom a debtor, at the request of his creditor, promises to pay part or all of his debt. Yet though the remedy is quasi-contractual the debtor's promise cannot be implied,[5] and so such a transfer will depend on his willingness to co-operate. It is true that a creditor can at common law direct his debtor to pay the money to another person,[6] but that does not give the other person any rights against the debtor. Only if the debtor can be induced to make an express promise to pay the third person will the latter have a remedy at law.

If therefore the person giving part of a debt does not wish to rely on an equitable assignment—for perhaps he is averse to being joined as a party in a subsequent action for its recovery—an alternative is open to him. He must persuade his debtor to promise to pay the sum to the donee, and the latter will then be invested with a legal remedy should the debtor in the end prove contumacious.

4 [1958] 1 Q.B. 448.
5 *Williams* v. *Everett*, *supra*.
6 *Per* Bayley J., in *Holland* v. *Anderson*, *supra*.

BOOK REVIEWS

Early English Legal Literature. By T. F. T. Plucknett, F.B.A.; Hon. Fellow of Emmanuel College, Cambridge; Professor of Legal History in the University of London. [Cambridge: University Press. 1958. viii, 114 and (index) 6 pp. 18s. 6d. net.]

This volume, the latest addition to the Cambridge Studies in English Legal History edited by Professor H. A. Hollond, is indeed a treasure. Its six chapters are the lectures which Professor Plucknett delivered in Cambridge in commemoration of the hundredth anniversary of the birth of Maitland (1850–1906). In them the master of today considers the master of yesterday and then proceeds to review the writings which English law produced during the period 1100 to 1500. He reviews these writings from an unusual point of view: he is concerned not so much with their legal content as with the manner of its presentation. Does the document show, as did the first quarter of Bracton's *De Legibus*, some effort to analyse and systematise the topics of the law; some effort, perhaps, to adapt the notions which civilians and canonists had devised? Or does it merely list, chaotically, technical points of pleading or of practice which, though likely to be useful in court, were unlikely to advance the common law? The method of approach, therefore, does not entangle one at all in the troublesome mysteries of early law and procedure. Each author, known or anonymous, is judged according to the shape and spirit of his work. And, by judging the mental qualities of those who wrote about law at a particular time, one may deduce something of the mental qualities of those who were engaged at that time in the practice of it.

The first chapter of the book, "Maitland's view of Law and History," speaks of the risks that are run by all who attempt to write institutional history (nevertheless, "let no one think that he can neglect anything that Maitland wrote"); of Maitland's style; of his early years at the conveyancing bar, and thence to the study of legal history and to the Downing Chair. In Maitland's inaugural lecture ("Why the history of English law is not written") there was something, the assertion that a writer on legal history should be a trained lawyer and should not venture into general history, which Professor Plucknett is at pains to rebut, assisted both by other points made in that lecture and by Maitland's subsequent career. The chapter ends with an elaboration of Maitland's plea that the courses of study for law students at a University should

include Legal History and Jurisprudence: the former, not for the dubious reason that English law can only be understood historically, but because it is liberal and liberating, is humane, and can make a man happy for life.

The Early Literature of English Law is considered in the five remaining chapters. They proceed historically, until they finally reach the dark age towards the end of the fifteenth century when the profession ignored even the Year Books; when only "the moon of Littleton" (Bracton had been "the sun"), assisted perhaps by some of the "readings" at the inns of court, served to illuminate the scene. Each chapter summarises briefly the progress or decline which its predecessor has described; and Bracton has pride of place, with two chapters devoted to his *De Legibus*, to the Maitland-Kantorowicz problem of his Roman learning or the lack of it, and the books which were modelled upon his.

But there is much more. The reader who aspires to a little knowledge of legal history must surely feel that he is witnessing scholarship as wide and profound as anything since Maitland, expounded elegantly and with precision by one who is closely aware of all the latest investigations into our law's medieval past. It is a book which should be read with deliberation: every sentence and every word of every sentence matters. And yet there is no heaviness. Even when we are led through the complexities of manuscript assessment or through the problems of Year Book authorship, interest runs high. Moreover, although the author's primary purpose is to detect, from their writings, the mental outlook and equipment of the lawyers who wrote and of their contemporaries, there are memorable phrases (*e.g.*, "the absurdities of *assumpsit*," p. 113) which have a wider import. And, on almost every page, we mark the skill in emphasising an important point: "no one who reads only the Year Books would ever suspect that Bracton had lived and written" (p. 94); are we indeed quite sure (p. 17) "that there is no need for another lecture on 'Why the history of English law is not read'?"

S. J. Bailey.

The Basis of Obligation in International Law and other papers. By the late J. L. Brierly. Selected and edited by Sir Hersch Lauterpacht, Q.C., LL.D., F.B.A., Judge of the International Court of Justice, and C. H. M. Waldock, C.M.G., O.B.E., Q.C., D.C.L., Chichele Professor of Public International Law in the University of Oxford. [Oxford: at the Clarendon Press. 1958. xxvi and 375 and (index) 11 pp. 50s. net].

This volume contains the principal writings of the late Professor Brierly, with the exception of *The Law of Nations* and *The Outlook for International Law*, but including his course of lectures given in

1936 at the Hague Academy of International Law under the title "Règles générales du droit de la paix." It also includes a biographical note by Professor Waldock, first published as an obituary notice in the Year Book of the Institute of International Law for 1955, and an appreciation of Brierly's contribution to international law by Judge Sir Hersch Lauterpacht, which appeared in the *British Year Book of International Law*, No. 32 (1955–6). In reviewing that volume of the *Year Book* for the *International and Comparative Law Quarterly* (October, 1957) I remarked that Judge Lauterpacht's article "reveals a deep knowledge of Brierly not merely as a teacher and a writer but as a man, and I do not think that a juster and more thoughtful assessment of his work could have been written." The most substantial portion of this volume is that from which its title is taken, and consists of lectures delivered at the Hague Academy in 1928 under the title of "Le fondement du caractère obligatoire du droit international." For Brierly the basis of obligation of international law was moral and spiritual and was only one aspect of "the binding character of law in general." For the same reason he rejected positivism and considered that "the modern resurgence of natural law theories seems to open a vista full of hope for legal science."

The remainder of the volume consists of articles, lectures, addresses and memoranda covering a wide field of topics and a range of places which included the University of Edinburgh, where Brierly, after retiring from the Chichele Chair at Oxford in 1947, held (and greatly enjoyed) the Montagu Burton Chair of International Relations for three years, the University of Granada, the University of Salamanca and the University of Michigan. His outlook upon international law was a very practical one and most of the chapters in this book deal with some matter affecting the development of international law and organisation—for instance, three chapters on Codification, including the "Draft Code of American International Law"; one on the proposal for an International Criminal Court and another, of particular importance, entitled "The Covenant and the Charter." A number of them deal with the function of international law in the settlement of international disputes, such as "The Rule of Law in International Society," "Law, Justice and War," "The Prohibition of War by International Law," "Sanctions," "The General Act of Geneva, 1928," and the British Reservations to that Treaty. In another group he examines with complete frankness "The Shortcomings of International Law" and in particular the inadequate machinery for peaceful change—a matter which centred on Article 19 of the Covenant of the League and received more attention between the two wars than it has received since.

The characteristic which marks the contents of the volume as a whole is that they are not so much concerned with the actual rules of international law as with its binding force, its development, the

means of improving and strengthening it and, in general, its proper place in the future in the relations between States. This fact, like the whole volume, is a strong reflection of the temperament and the outlook of the writer. Brierly was essentially a philosopher and a very independent thinker, but in all the chapters bearing this characteristic he writes, not as the external critic of a system, but as a lawyer who has as good a grasp of the rules of international law as anyone. Brierly had an excellent legal mind and the surprising thing is that so little of his work should have been concerned with the actual content of international law. Nevertheless, some of the chapters of this book deal with the law itself, for instance: "Matters of Domestic Jurisdiction: Article 12, paragraph 8, of the Covenant," "The Lotus Case," "The Theory of State Complicity in International Claims," and "International Law and Resort to Armed Force."

His *Law of Nations*, which is now the first book to be read by any well-advised student of international law in this country and the United States of America, is a model for an introductory book; although it covers a very wide ground in only 326 pages, its statement of the law is marked by the same degree of accuracy on any topic as one is entitled to expect from a book many times that size. All that he wrote, and all that he spoke, was marked by sanity and something more than sanity, that is, wisdom. His strength lay in being able to think. He never allowed his mind to be overlaid and obscured by the mass of reading which it is necessary to keep up with in a rapidly developing subject. He was always able to disentangle himself and look at it from the outside. This power of detachment, accompanied by a great capacity for clear thought and expression, was the main source of his strength. These are intellectual qualities, but from his temperament he derived other qualities which mark his work. He was strongly progressive—both in national politics and in the sphere of international relations, but at the same time he was cautious and objective. Unlike so many progressively minded people, while he might be emotionally attracted by some forward-looking proposal, he never allowed that to deflect him from his sense of duty as a scholar and a prudent citizen to examine the proposal in a truly objective manner.

The reader of this book will soon realise why it was that Brierly exercised so deep an influence upon many generations of law students and teachers and upon a wider circle of those who followed international affairs closely from 1919 onwards. He played a vital part in securing the wider recognition of international law as a principal, though not the sole, factor in any permanent organisation of interstate relations, and he achieved this object very largely by never over-stating his case.

McNair.

Kenny's Outlines of Criminal Law. Seventeenth edition. By J. W. Cecil Turner, M.C., M.A., LL.B., of the Middle Temple, Barrister-at-Law, Fellow of Trinity Hall, Cambridge. [Cambridge: University Press. 1958. lxiv, 612 and (index) 16 pp. 60s. net.]

In 1952 Mr. Turner produced an entirely new edition of Professor Kenny's classic and so ensured its place as the leading modern students' textbook on the subject. The continual growth of the criminal law—a growth sometimes marked by that indeterminacy which Professor Lovell tells us may well have characterised the primeval atom—has rendered necessary within the space of only six years considerable revisions and additions. While Kenny's original chapter on the Nature of a Crime has had to go, Mr. Turner has brought in references to some 400 fresh cases and a number of statutes with an increase of only fifty-one pages in the text, and this he has done with the accuracy and precision one would expect, preserving always that scientific and critical treatment which keeps the student from falling into the delusion that criminal law is an easy subject. In no other branch of the law is the conflict between the need to protect society on the one hand and to respect the liberty of the individual on the other more incessant or more strenuous, and it is not surprising if some cases emphasise one rule and some another. However unswerving the devotion to legal principle, the court always seeks to bring about a result which may be considered fair and just in the particular circumstances. Thus for example one can appreciate all that is said at pp. 283–284 about *R.* v. *Riley* and *Ruse* v. *Read*, but the law is not mocked by those who purloin sheep or bicycles. The greatest interest of all will attach to the section of the book dealing with homicide, much of which has had to be rewritten in view of the passing of the Homicide Act, 1957. Mr. Turner's criticism in the *Criminal Law Review* and his new edition of *Russell on Crime* of the decision of the Court of Criminal Appeal in *R.* v. *Vickers* [1957] 2 Q.B. 664, has aroused controversy. Here he has subordinated criticism to setting out clearly for the student the substance and implications of the decision. This is not the place to attempt the expression of opinion upon the interpretation of section 1 of the Act. But this much may be said, that Mr. Turner's criticism of the decision in *Vickers* springs from "something far more deeply interfused," namely his fundamental belief in the subjective as opposed to the objective test of *mens rea* in homicide: in murder the accused must be proved to have intended in his own mind to kill or to do an act which he was well aware might have fatal consequences. The objective test is stated by Holmes: "What is foresight of consequences? It is a picture of a future state of things called up by knowledge of the present state of things. . . . If the known present state of things is such that the act done will very certainly cause

death, and the probability is a matter of common knowledge, one who does the act, knowing the present state of things, is guilty of murder, and the law will not enquire whether he did actually foresee the consequences or not. The test of foresight is not what this very criminal foresaw, but what a man of reasonable prudence would have foreseen" (*The Common Law*, pp. 53–54). In holding that the history of the English criminal law shows the emergence of a subjective test Mr. Turner is surely on the side of the angels. A little over a century ago H.M. Commissioners on Criminal Law said in their Fourth Report that if a man "does an act, however dangerous it be in its own nature, without any knowledge or suspicion of its tendency, that is, if he does not wilfully place life in peril, he cannot be said to show *mens mala* or heart bent on mischief. . . . It is the wilful exposure of life to peril that constitutes the crime." And Chief Baron Pollock in drawing the distinction between murder and manslaughter, laid it down that no one could commit murder without the consciousness that the act done was one which would be likely to cause death. Sir James Stephen in his *Digest of the Criminal Law* (1877) included an intention to cause grievous bodily harm among the several states of mind amounting to malice aforethought, but in the Draft Code (1879) prepared by the Commission of which he was himself a member it was proposed by Article 174 that culpable homicide should be murder "(*a*) If the offender means to cause the death of the person killed; (*b*) If the offender means to cause to the person killed any bodily injury which is known to the offender to be likely to cause death, and if the offender whether he does or does not mean to cause death is reckless whether death ensues or not." Finally, in our own time the Royal Commission on Capital Punishment in 1953 expressed a preference "to limit murder to cases where the act by which death is caused is intended to kill or endanger life," and it is of great importance to notice that in his evidence before the Commission Lord Goddard accepted Article 174 (*b*) of the 1879 code, quoted above, as providing a satisfactory direction to a jury.

The passages above mentioned point clearly to the subjective test for which Mr. Turner contends. As the law stands it must be accepted that an intention to cause "grievous bodily harm" is sufficient to constitute malice aforethought. But everything depends upon what this inelegant and inexact expression means. If, as in cases under the Offences against the Person Act, 1861, it simply denotes something which seriously interferes with health or comfort, "murder by pinprick," as Mr. Justice Devlin has said, "is not a legal impossibility." Is this a satisfactory state of affairs? Rules of law which do not commend themselves to the good sense and moral feeling of the jury result in so called "perverse" verdicts and bring the law into disrepute. One could wish that the

opportunity had been taken to clarify the law upon this vital matter by legislation.

Ever since, in 1934, Mr. Turner contributed to this Journal (Vol. V, p. 230) his celebrated article entitled "Attempts to commit Crimes" we have awaited judicial adoption of his suggestion as to what constitutes the *actus reus* of an attempt. Indeed, we know of one particular practitioner who for years has kept the gist of it noted on the back fly-leaf of his Archbold ready for instant use at Assizes or Sessions. Mr. Turner is right in our view to claim at p. 93 that the test he puts forward was applied in *R.* v. *Miskell* [1954] 1 W.L.R. 438. It has been said elsewhere that passages from the judgment have here been seized upon and quoted out of context. Reference to p. 440 of the report will show that the sole question upon which the appeal turned was whether the act or acts of the appellant could constitute as a matter of law an attempt to commit the offence charged. The passage cited is exactly relevant to that question, and in our view there is no ground for impugning Mr. Turner's interpretation. It is of special importance that his valuable contribution to the law upon this matter should not be misunderstood.

Attention must be drawn to the most useful Appendix I on "the Meaning of Credit." Charges of obtaining credit by fraud and of bankrupts obtaining credit are frequent and the cases cited by Mr. Turner, some of them quite recent, illustrate the difficulties. In *R.* v. *Goodall* (*The Times*, November 4, 1958) the point arose whether if a man obtains money on the faith of a promise to supply goods or render services in the future he is obtaining credit. Lord Parker C.J. in delivering the judgment of the Court of Criminal Appeal said that the matter was one which one day would have to be looked at with very great care, but in the present case the court found it unnecessary to decide the point. We venture to express the hope that when this and kindred problems do recur the attention of the court may be invited to Mr. Turner's analysis of the meaning of credit and his review of the authorities.

No useful purpose is fulfilled by noting small misprints and trivial errors—of which there are few. But the student likely to have occasion in the future to advise a client whether to go for trial at Sessions or elect to be dealt with summarily on a charge of being under the influence of drink when driving a motor-car should make a note in the margin at p. 59 that the penalty on conviction or indictment has been increased to a maximum of two years' imprisonment: see Road Traffic Act, 1956, s. 51 and Schedule VIII, para. 12 (4). There are still instances in this work where statutes are cited by their regnal year and chapter rather than by their short titles: thus while one recognises the "Offences against the Person Act, 1861" (at p. 109 and elsewhere) as an old acquaintance, the references to "24 and 25 Vict. c. 100" at pp. 41, 175, 228n and 528n suggest the presence of a stranger.

It is pleasing to see that the efficiency of the index has been greatly enhanced by the insertion of references to page numbers as well as to paragraph numbers. To a practitioner the index is all-important. And this brings us to a final point: pre-eminently a students' book as this is intended to be, and a brilliant one as it is, nevertheless when the practitioner comes to argue a question of principle he will neglect Kenny to his own loss and his client's detriment. Happy alike are they who are required and they who wisely choose to read these pages.

P. Malcolm Wright.

Lord Nottingham's Chancery Cases, Volume 1. Edited with an Introduction by D. E. C. Yale, Fellow of Christ's College, Cambridge; of the Inner Temple, Barrister-at-Law. [London: Bernard Quaritch. (Publications of the Selden Society, Vol. 73.) 1957. cxxxi and (index) vii and 446 pp. 73s. 6d. net.]

Mr. Yale's introduction to the volume of *Lord Nottingham's Chancery Cases* is so erudite and well written that its promised successor, which will contain the remainder of Nottingham's Cases and " a detailed discussion of some leading principles and doctrines of equity," is eagerly awaited.

The first part of the Introduction gives a biographical sketch of Nottingham's career which is well documented, scholarly and stimulating. The key to Nottingham's character finds expression in Mr. Yale's remark (p. xi) that he " inherited a family background which was best calculated to help him in a legal career and also family wealth which might have turned the edge of a less able or ambitious nature." His application to the task of mastering the common law is perhaps the foundation of his greatness as Chancellor: it is therefore fitting that Mr. Yale should stress this both towards the beginning (p. xii) and end (p. cxxxi) of his Introduction where he pertinently observes: " the development of equity from Nottingham to Eldon might have been seriously impaired unless it had been in the hands of men deeply versed in the rules of the system that it was their judicial duty to supplement." Nottingham's happy family life, moderation, courtesy, sincerity, ill health, eloquence and regard for a certain degree of ceremony are all touched upon. Mr. Yale's appraisal of his political career reveals a man " not partisan enough to inspire popularity though respected for his impartiality," which Mr. Yale does not consider to have been affected by the indecency of his remark in Lord Stafford's trial: " who can doubt any longer that London was burned by the Papists? " Like Stephen in his *History of the Criminal Law*, Mr. Yale considers that Nottingham treated the prisoner with great courtesy and fairness, and like Acton in his *Lectures in Modern History* that it was the weakness of the conduct of the defence

rather than impropriety on the part of the court which led to the conviction. Mr. Yale rejects the charge of timidity often made against Nottingham but concludes that he was not naturally a politician, still less a politician suited to his times.

The second part of the Introduction deals with "Lord Nottingham and Precedent in Equity." Mr. Yale makes it plain that no notion of precedent, as it is commonly understood today, existed at the beginning of Nottingham's chancellorship and then goes on to give a brilliant analysis of the factors which were important in the transformation or hardening of equity during his period of office. The transition from "private conscience" to "legal and regular equity" is motivated by the emergence of reports, general judicial policy, the application of the common law analogy wherever the principles of equity required to be stiffened and the impulse to the development of equity given by maxims which have been deduced from the earlier cases. Mr. Yale is careful not to claim too much and his assessment of the contribution made by each of these factors to the transformation is all the more valuable for that. Mr. Yale then measures his assessment by a consideration of the force of precedent in two distinct fields, namely, the law of real property, with particular reference to the rules governing the vesting of contingent interests, and, secondly, the jurisdiction against fraud and overreaching.

Nowhere is the story of Nottingham's handling of precedent better told than in Mr. Yale's account of the *Duke of Norfolk's* case. The triumph of reason over artificiality results from the Chancellor's thorough grasp of the common law decisions and his ability to forge a rule which furthered the policy of freeing land from the chains of perpetuity on a rational basis which has stood "with the reason of mankind" whenever his decision has been "debated abroad." It is a happy inspiration which led Mr. Yale to examine the jurisdiction against fraud and inequitable conduct in Nottingham's day. Here the difficulties of transforming equity were immense. Even in Nottingham's time the poverty of the plaintiff had ceased to be an equity of itself, but Nottingham concentrated on the defendant's conscience, and developed the law to the point where mere imprudence on the part of the plaintiff ceased to be, and inequitable overreaching on the part of the defendant became, a ground for equitable relief. Nottingham's regard for the common law is illustrated by his attitude towards the award or refusal of a decree of specific performance, and Mr. Yale makes the very interesting point that it was a matter of quite correct assumption in Nottingham's day that the Statute of Frauds did not apply where a contract had been executed in part: hence the probability that the scope of the doctrine of part performance never came before one who helped to promote that Statute.

Mr. Yale then considers Nottingham's attitude to questions of jurisdiction. Nottingham's general view was that appeals ought to

be carefully regulated. In pursuance of this he refused consistently to countenance appeals from statutory jurisdictions where the object of the enabling legislation was to provide speedy decisions. Paradoxically, however, he introduced the appellate bankruptcy jurisdiction into Chancery. Mr. Yale shows how this crept in almost imperceptibly, because the cases in which it first occurred were cases of the auxiliary jurisdiction of equity, and it was sometimes necessary to come to equity because of the greater efficacy of that court. But Mr. Yale is careful to point out that though Nottingham was responsible for the inception of the jurisdiction, he was not to be blamed for the congestion of the business of the court to which it later led.

The third part of the Introduction contains an excellent short account of Nottingham's writings which include, in addition to the Reports, two treatises, one on Chancery practice and the other an exposition of many of the rules of equity (*Practice and Prolegomena* respectively). It is exciting news that Mr. Yale hopes to publish the two treatises in the Cambridge Legal History series. These Reports and treatises do not exhaust Nottingham's writings: there are also a treatise on the King's power of granting pardons in cases of impeachments, letters on legal matters, *e.g.*, a sixteen-page essay to Sir Roger Twysden in 1666 on forfeiture for treason before the Conquest, and, above all, his series of annotations upon Coke's Commentary upon Littleton's *Tenures*, from which Mr. Yale concludes that his thorough knowledge of the Year Books enabled him to question Coke's statements and to avoid the uncritical appreciation of the text which was common among later generations of lawyers.

I congratulate Mr. Yale on an edition which will enhance both his own reputation as a scholar and that of the Selden Society, whose reputation for works of erudition stands justly high.

O. R. Marshall.

Fault in the Formation of Contract in Roman Law and Scots Law. By Peter Stein, Professor of Jurisprudence in the University of Aberdeen. [Published for the University of Aberdeen by Oliver and Boyd, Edinburgh and London. 1958. viii and 211 and (indexes) 5 pp. 20s. net.]

This is an interesting and unusual book. It consists of two parts. The first and larger part is devoted to the consideration of a problem in the Roman law, the second to a discussion of the same problem as it appears in Scots law, which basically is a civilian system. The problem is the effect of fault in the formation of contract—*dolus* and, what Jhering called, *culpa in contrahendo*, meaning thereby wrongful conduct by one of the parties in the

negotiations leading up to a contract, but taking place before the contract is concluded.

The Romans never formulated a general theory of contract: their concern was with individual types of agreement. Accordingly, any study, such as that under consideration, must deal with a number of representative contracts. Part I is therefore divided into thirteen chapters, of which six are given to sale, as the most important commercial contract, the thirteenth to the author's conclusions on the whole matter, and the remainder to hire, mandate, pledge, loan, the counter-actions, and the position of the thievish slave.

A more limited discussion of the same problem, undertaken by Karl Heldrich, was published in 1924 at Leipzig. Heldrich held that the classical Roman jurists looked at wrongful conduct in the formation of contracts as a delict to be remedied by the *actio de dolo*, and that the contractual action mentioned in a number of texts was an innovation, introduced in the time of Justinian and valid only in the late law. Professor Stein does not agree with this point of view, and, in the opinion of the present reviewer, successfully proves that, even in the classical law, the contractual action was available to the injured party in cases where he complained of wrongful conduct, although at the time of such conduct there was as yet no contract binding the parties. Many of the contentions put forward by Heldrich are far-fetched, and are too often justified by the convenient explanation that any text which plainly contradicts his proposition must have been interpolated. Alterations in the texts incorporated in the Digest are, of course, numerous. Justinian himself said that they were *multa et maxima*; and it could not be otherwise, if law which was already several centuries old was to serve satisfactorily a later age. But the hunt for these alternatives is an insidious and dangerous pastime. It is, therefore, particularly noteworthy that throughout Professor Stein has kept firm hold on reality and common sense. Where a text has manifestly been altered, he accepts the fact; but, in other cases, for example, in the fragment from Africanus (D. 47.2.62.5), he has the courage to disagree with authorities of the eminence of Lenel and Jolowicz, and extracts from his investigation a highly satisfactory explanation of the view taken by the classical jurists with regard to the slave bought under mandate who steals from the person who was instructed to buy him. Indeed, the chapter, headed "The thievish slave," is one of the most interesting in the book. It is difficult to understand the Roman law properly without a knowledge of the place occupied by the slave in Roman society; and the position of the slave in regard to the law is one of considerable complexity, as Buckland's great work on slavery shows. In this chapter concerned with the slave who, being himself the subject of a *negotium*, has stolen from one of the parties to that *negotium*, one aspect of the slave problem is given full and careful treatment.

The whole book is based on a close study of the relevant texts, not only legal, but also non-legal, such as the *De Officiis* of Cicero. The author shows a wide knowledge of the modern literature on the subject, and his argument is copiously illustrated by quotations from French, German and Italian writers. In the result, he presents a sane and balanced answer to the problem which he set out to investigate. There are, of course, points upon which the reader may not wholly agree with what is stated. For example, the suggestion that "*confinem celaverit*" (in D. 18.1.35.8.) does not mean "conceal the name of an adjoining proprietor" is not convincing—even though it has the blessing of Professor Daube. From a practical point of view—and the Romans were essentially practical men—a sale of property might well be prevented if, on hearing the name of the next-door neighbour, the would-be buyer recognised it as that of a man whom he knew to be quarrelsome, troublesome and difficult.

The Scots law on this matter is not simple. In fact, as one of the present-day Scottish judges has said: "The law as to the cutting down of contracts where there has been misrepresentation seems to me to be in a state of confusion." In the beginning Scots law dealt with fault in the formation of a contract under two heads—fraud and error. The idea of non-fraudulent misrepresentation is an innovation of comparatively recent date. The Scottish institutional writers laid down a few simple rules, based on Roman texts, to deal with fraud and error. The absence in the earlier law of a liability for innocent misrepresentation was probably not greatly felt for two reasons, first, the principle that *culpa lata* was the equivalent of *dolus* enabled a wide interpretation to be given to fraudulent conduct; and, second, the recognition in sale, that there was on the part of the seller an implied warranty against latent defects in the thing sold, allowed the buyer to reject the goods on discovery of the fault, and relieved him from payment, or entitled him to sue for recovery of the price. Stair and his immediate successors concerned themselves mainly with fraud and the implied warranty in sale. It is not until Bell, at the beginning of the nineteenth century, that error received fuller treatment. Professor Stein devotes one very illuminating chapter to the law as revealed in the institutional writers; and, passing from the five categories of error which Bell lays down, proceeds in the next chapter to discuss the development of the modern law, pointing out that all the cases which Bell cited, as illustrating error in substantials, were cases either of mutual error, shared by both sides, or of error fraudulently induced. Soon unilateral error in substantials, induced by innocent misrepresentation, was held to be enough to allow reduction of a contract. But, where the error created by the misrepresentation was not in a substantial, but only in a collateral matter, even though such misrepresentation was the cause which induced the contract, the contract could not be reduced. Both in England and on the

Continent a remedy was provided in such cases, where none existed in Scotland, and the author shows how Scotland, instead of following its traditional eclecticism, and taking either the English rule or the Continental rule, adopted, what he calls, " a muddled mixture of the two, taking the rules laid down in English cases, and clothing them in pseudo-civilian dress." To this he attributes the subsequent confusion which the reported cases disclose. He deals exhaustively with the principal cases and arrives at the modern Scots position: that a material misrepresentation, whether fraudulent or innocent, which induces a contract, renders the contract voidable. Reduction may therefore be decreed, so long as *restitutio in integrum* is possible. The remedy of damages is available only where the misrepresentation is fraudulent. The examination of the relevant cases is painstaking and thorough, and shows an independence of outlook. It is refreshing, for example, to read that, in Professor Stein's opinion, Gloag and Candlish Henderson, both of whom were experienced practitioners as well as academic lawyers are correct in citing *Stewart* v. *Kennedy* ((1890) 17 R. (H.L.) 25; 15 App.Cas. 75) and *Menzies* v. *Menzies* ((1893) 20 R. (H.L.) 108) as authorities on the question of innocent misrepresentation not affecting the substantials of a contract, a point of view which has received criticism of late years in academic circles.

Professor Stein is to be congratulated on a fine piece of work. He is never extreme: his criticism and his conclusions are balanced and sound: and he has made a valuable and original contribution to the study of a most difficult subject. The book itself is admirably printed and produced.

M. G. Fisher.

The French Legal System. An Introduction to Civil Law Systems. By René David, Professor of Comparative Civil Law, University of Paris, and Henry P. de Vries, Professor of Comparative Law, Columbia University. [New York: Oceana Publications. 1958. 148 and (index) 4 pp. 42s. net.]

This work, which is sub-titled *An Introduction to Civil Law Systems*, is not only a most valuable guide to the French legal system but also a key to the civil law systems generally. Although short—the actual text is only 134 pages—it packs a surprising amount of information into its tightly-written pages as well as supplying full references for further reading. Of the authors, the first has long had a world-wide reputation as a *comparatiste* and the holder of the chair of *droit civil comparé* in the University of Paris, and those familiar with his magistral *Traité de droit civil comparé* will find here a distillation of many of his ideas. The second author is Professor of Comparative Law at Columbia University and is

doubtless responsible for much of the comparison with Anglo-American law and for the actual writing and the assemblage of the English bibliographical material.

The purpose of the book is stated in the preface to be a modest one, that of serving as "the primary step in orientating the law-trained American in the habits of legal thinking in other parts of the world"; and this primary step is to be taken in regard to the civil law systems, in which, in the authors' view, "the tradition, the structure and the decisional techniques are the core of the process of comparison." The authors then state their belief that the French legal system serves, for common lawyers at least, as the nearest and most direct bridge to the civil law world; and they proceed to examine the tradition, structure, and decisional techniques of the French system, their book being divided into three parts, one devoted to each of these heads.

In the first part, entitled the French Legal Tradition, eight pages are given to an historical outline of the Napoleonic codification, and there follows a sketch of the machinery of justice in France where we are introduced, first, to "the law professionals" (that is, the judiciary, the *parquet*, the *avocat*, *avoué* and *notaire*, and the law teachers) and, secondly, to the "Political and Judicial Organisation." Under this last head is to be found an analysis of the now defunct Constitution of 1946 in terms of the separation of powers, a thumb-nail sketch of the system of courts, and a very necessary explanation of what "*l'Administration*" connotes to a Frenchman.

The second part of the book sets out to explain the structure of French law, the aim being "a summary presentation of the content of the basic branches and categories." At the outset the reader is warned that the various branches tend to maintain an autonomous character, each with their specialised content and techniques. This autonomy becomes manifest as one reads the ensuing chapters where each basic classification of law (public, private, civil, commercial, criminal, administrative, fiscal and labour) is reviewed briefly but with sufficient emphasis on the salient points to become meaningful to the common lawyer. Thus, the authors explain that constitutional law must be regarded rather as an aspect of political science than as lawyer's law in a system where there is no judicial review of constitutionality, that French criminal law lacks the solid basis of traditional Romanist concepts which characterises the *droit civil*, and that procedure and evidence seem of less importance in a system where litigation has never been the heart of any definition of law and where "the concept of a substantive right carries with it various consequences, of which the possibility of enforcement in the courts is only one."

The third, and perhaps most valuable, part of the book describes the part played in the formulation of legal rules by the traditional sources of French law: *loi*, custom, *jurisprudence* and *doctrine*.

Here it is good to see that some of the past exaggerations about the respective roles of the continental and the Anglo-American judge are corrected; that the French judge is no less capable of creating new law, *le contentieux administratif* strikingly demonstrates with its unwritten *principes généraux du droit*. But the authors tend to give insufficient weight to the place of statute in modern English (and, one suspects, American) law: thus, we read (at p. 82) that "the lawyer trained in common law method tends to view the case law as the primary source of legal rules, into which a general statute is assimilated." Now this observation might be true of statutes such as the Sale of Goods Act, but can it be applied to the Town and Country Planning Act, 1947, or the Income Tax Act, 1952, or the National Insurance Acts?

The authors also show how the French judge may escape from the *jus strictum* which his formal sources dictate, either by the inbuilt flexibility of technique with which these sources are traditionally handled, or by recourse to such external concepts as *fraude*, *équité*, unjust enrichment, abuse of rights, *ordre public* and *bonnes moeurs*.

Finally, there is a useful appendix of references to leading French textbooks, periodicals, reports, etc. These supplement the readings recommended at the end of each chapter.

This is an extremely penetrating and wide-ranging account of the French legal system, the like of which has not previously appeared in English (the *Introduction to French Law* of Amos and Walton having a more limited scope). Nor indeed is there any single work of equivalent compass and scale in the French language. It should be welcomed by all, whether student or teacher, who wish to enter that civil law world to which French law provides the best gateway. It emphasises again the need for teamwork in comparative law: this book could not have been produced except by collaboration between a French lawyer, steeped in his own law, and a common lawyer mindful of the sort of questions and difficulties that a civil law system presents. It would therefore be a pity if the English reader were put off by the language in which the book is written. For in style, syntax and vocabulary, this language is manifestly American rather than English; and it is not a beautiful language.

In such a masterpiece of compression one hesitates to criticise over-simplification. But is not more explanation needed to make meaningful: the role of the *avoué*, the probative value of an *acte authentique*, and the significance of the decision in *Cadot* (as marking the eclipse of the notion of *le ministre-juge*)? But these are very minor criticisms of a good book. It is also well printed and bound and almost free from misprints ("commerical" at p. 43 and a wrongly italicised "is" at p. 64 were the only ones noticed). But the price unfortunately is of the order of magnitude one has come to expect from the publishing houses of the New World.

L. Neville Brown.

The History of Local Government in England, being a re-issue of Book I of Local Government in England. By JOSEF REDLICH and FRANCIS W. HIRST. Edited with Introduction and Epilogue by BRIAN KEITH-LUCAS, Fellow of Nuffield College and Senior Lecturer in Local Government in the University of Oxford. [London: Macmillan & Co., Ltd. 1958. xv and 256 and (index) 3 pp. 30s. net.]

REDLICH and Hirst is a well-known book. The only edition was published in 1903, and the whole of the remaining stock was destroyed in an air-raid during the last war. It is therefore difficult to find a copy in the shops; and it is good that this reprint of the most valuable part of the book should now appear. The part which is republished is that dealing with the history of the development of local government during the nineteenth century. As its editor says: "As a picture of the development of our local administration it remains unequalled and unrivalled." The remainder of the original work gave a lucid account of the way in which local authorities functioned at the beginning of the present century. Apart altogether from the cost of reprinting so much material, the wisdom of doing so was doubtful. Much has happened since 1903, and the local administration of tranquil Victorian days is a thing of the past. The political element, which in earlier days was largely absent, now plays an important part, and the burden, which the work of local government lays upon those who give their time to its service, is heavy. Moreover the functions which they are called upon to discharge have altered greatly in the past fifty years. Three great codifying Acts have been passed during that time—the Local Government Act, 1933; the Public Health Act, 1936; and the Food and Drugs Act, 1938. It is true that these Acts, while they simplified the law, did not make any great alteration in its content. But the Local Government Act did have one important new provision. It made general the power of a council to delegate its executive powers to its committees. Where this provision has been used, the committees have grown more independent; and the full meetings of the council have tended to lose in importance. But the changes in function which have resulted from general legislation are numerous. The poor law was first reformed, and then, in 1948, abolished: educational administration has been altered: housing has assumed a new importance: town and country planning gives powerful control: and local authorities can no longer trade as gas and electricity undertakers. The system of Exchequer contributions has been changed, and the control of the central authority has tightened over the whole field of administration. The editor has therefore added to the main work an epilogue in order to show what has happened since the original work appeared. This is an admirable piece of work, giving in clear and concise form the main developments of the past fifty years.

The book in its present form will be invaluable to students and can be warmly recommended to all who seek to understand the working of those institutions which have such an important effect on the everyday life of the community.

M. G. Fisher.

Teach Them to Live. A Study of Education in English Prisons. By Frances Bankes, m.a.(Psych.). With a Foreword by the Rt. Hon. Lord Birkett. [London: Max Parrish. 1958. viii and 281 and (index) 5 pp. 30s. net.]

In the Foreword to this book, Lord Birkett says "This book is mainly concerned with the place of education in prison life, and the whole subject is discussed in these pages with understanding and insight that springs from the faith of which I have spoken." The author explains in the Introduction that, soon after she returned to England from South Africa in 1950, after a long period of educational work as lecturer and principal to a training college for women teachers, she heard from an old acquaintance of the interesting development known as the "Maidstone Experiment" in prison education. Moved by a story in Ivor Novello's obituary, she applied to take a weekly group in Psychology which was defined as "Human Relations." Later, she was invited to apply for the newly created post of Tutor Organiser at Maidstone Prison. She accordingly found herself the only full-time woman on the personnel staff of a prison for men. She remained in this employment for three and a half years. It was then suggested that she should write a book on prison education. She set out upon a course of reading, and thereafter, with the permission of the Prison Commissioners, upon a series of visits to other prisons. This book is the result. The author decided to exclude Borstal Institutions and Detention Centres. There is a separate and very interesting section of the book dealing with the education of women prisoners. Of men's closed prisons, the author visited, amongst others, Pentonville, Wandsworth and Wormwood Scrubs. She also visited certain semi-open prisons and satellite camps, and several open prisons, including the one at Leyhill, which consists of hutments. The book is divided into seven parts ranging from "The Historical Growth" to "Education as Therapy." Before the outbreak of the 1939 war, education in prisons had made great strides, but a severe setback was caused by the War. The best summary of progress since the end of the War is to be found in the Table for evening classes which was published by the Prison Commissioners in their Report for 1955 and is reproduced on page 42 of the book. It is, as the author says, a Table of which the Commissioners may well be proud. It shows, for example, that there were, at the time in

question, one hundred classes in music, and that the average number of prisoners in the classes was seventeen. Perhaps the most interesting chapter in the book is that dealing with "Post-War Developments to Date," which shows the amazing progress which has been made in the education of prisoners and the variety of subjects taught. The average member of the public knows little or nothing about the education of prisoners. This book deals with the subject in a clear, comprehensive and simple fashion, which is calculated to appeal to anyone who is interested in his less fortunate fellow creatures. The author has taken an immense amount of trouble both in preparation and in writing, and the result will, as Lord Birkett says "be welcomed as an important contribution to our social history." This is an excellent book which should be read not only by social workers but also by members of the general public.

GEORGE A. MONTGOMERY.

The Changing Conception of Contracts in English Law. By SIR DAVID HUGHES PARRY. [Jerusalem: Magnus Press; London: Oxford University Press. 38 pp. Paper cover. 6s.]

IN this lecture, one delivered before the Hebrew University of Jerusalem, Sir David's object is to show how the classical idea of a contract with its emphasis on consent and agreement, on the autonomy of the individual will, has been affected by changes in political and economic circumstances, by the eclipse of *laissez faire* and the appearance of the planned economy.

It first deals with agreements which create rights and duties which are not enforceable by ordinary courts, the honour pledge clause, family and social arrangements, trade and professional associations, "closed shop" agreements. The exact significance of these points to his argument is not obvious. Social sanctions presumably always have existed: as society changes, other extra-legal sanctions will appear. But that in itself hardly can be said to be changing the concept of a contract in law. It seems to show merely that relationships which in the past might have been embodied in a contract at law, are now considered by the parties to be adequately protected by other sanctions. That is, of course, interesting, but another interesting point which is mentioned, though not very explicitly until the end of the lecture, is the tendency on the part of the courts to exercise some partial control over such arrangements not on any contractual ground, but because of their duty to enforce "public policy."

Secondly he turns to the increased use being made of implied terms with the suggestion that more and more the courts are turning away from an attempt to find out what the parties really

intended (*e.g.*, in frustration cases) in order to impose on them a just and reasonable solution. Here, however, attention must be paid to the decision of the House of Lords in *Davis Contractors, Ltd.* v. *Farnham U. D. C.* [1956] A.C. 696, a decision reached after the learned author's lecture, and which would seem to show that that body at least, at the moment, would not attempt to "make a contract for the parties."

Other matters, standard form contracts, illegal contracts and the like are touched upon.

This lecture is well worth reading. It is a good summary of many recent trends and it encourages the reader to speculate as to what should be done to deal with the situations disclosed.

KENNETH SCOTT.

Star Chamber Stories. By G. R. ELTON. [London: Methuen & Co., Ltd. 1958. 236 and (index) 8 pp. 21s. net.]

THIS book is an interesting and entertaining collection of half a dozen stories extracted from extant Star Chamber records. They all come from the middle years of Henry VIII's reign and diverse as they are in incident and background all have in common the tantalising feature that the decision of the court is not known, since the books of decrees and orders disappeared in the disturbances of the seventeenth century. But the surviving materials, notably the written pleadings and depositions, are extremely rich in the disputations of the parties and the details of their stories (naturally differing very often in content and tone). The result is a very readable little book.

These stories are of more direct interest to historians rather than to lawyers. Some familiar figures appear. The first story is that of the distressing decline and fall of John Perkins, author of "The profitable book," a very useful manual of conveyancing which Coke commends as "witty and learned." A mixture of religious biliousness and professional disappointment makes him cut a sorry figure in a piece of Reformation McCarthyism at Oxford. (Incidentally, the author relates Perkins' denial of a story that about 1517 "my heels were turned upward and my head downward in Westminster Hall, and so banished the Hall" and comments that "if it was true (and if such ceremonies were really employed in drumming a man out of the centre of England's legal system) it would certainly help to explain his later state of mind." *Les Reportes del Cases in Camera Stellata*, 1593–1609, ed. W. P. Baildon, pp. 70, 257–258, might be cited here to show that attorneys disbarred for abusing the process of the common law courts were certainly liable to severe penalties which included a ceremonial chucking out and being thrown over the bar of the court.)

Next we have a vivid account of some of the violent Town and Gown troubles of sixteenth-century Cambridge. The third story is an account of a pertinacious common informer and the perils of his profession; a useful sidelight on the Tudor problem of law enforcement. Other stories centre round local fiscal and religious dog-fights which found their way into the cognisance of the Star Chamber. These tales have their morals for historians; for the lawyer the information is on the whole fragmentary and too often frustrating.

It would be idle to complain that this book is not compiled on the lines of the last volumes to appear in the Selden Society series, Bayne's *Select Cases in the Council of Henry VII*, with its elaborate introduction on the jurisdiction and procedure of the Council. Such is not the author's aim. Yet admirable as is his handling of many technical matters arising on the sources, some of his statements, even in general terms, are not unquestionable. Thus, to take one instance only, it is not correct to say that at this time trial by witnesses was " a method almost unknown to the common law " (p. 16). True, parties could not be heard on oath and the common law was slow to admit the evidence of parties and witnesses. In early days the jury was used as a source of evidence and witnesses could be compelled to appear. But in 1563 a statute (5 Eliz. 1, c. 9) enacted that witnesses could be compelled to appear in civil cases and give evidence. It is clear from other sources too that, in Tudor times and earlier, witnesses appeared in actions and trials and were examined in much the same way as today. We should perhaps think somewhat odd the practice of refusing to allow evidence for the defence on a capital charge to be given on oath. Coke and Hale themselves thought this difficult to justify either in law or reason. But here progress has been slow. The Crown only acquired power to compel appearance of its own witnesses by statute in 1555. The difficulty of introducing witnesses for the defence at all may account for Coke's remark that evidence of witnesses to a jury is no part of a criminal trial, for trial is by jury, not by witnesses. Probably some such statement as this has misled the author.

Notwithstanding some few small points of this nature this collection provides valuable side-lights on problem of legal process and law enforcement as well as giving some vivid glimpses of sixteenth-century Englishmen, their methods and their madnesses.

D. E. C. YALE.

UNIVERSITY LAW SOCIETY
1958–1959

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During the Michaelmas Term there were five meetings of the Society. The first was a moot in contract against Oxford before Mr. Justice McNair, who also set the problem. It was based on his decision in *Andrews* v. *Hopkinson*, and proved a subject of tremendous value, especially to those engaged on Tripos Part II. Later in the term there was another moot, this time with the Holdsworth Society of Birmingham University, at which Mr. Justice Upjohn presided. The subject was Defamation, and was a source of both interest and amusement, junior counsel for Cambridge submitting at one point that *Royal Aquarium Society* v. *Parkinson* just would not hold water.

The society welcomed as speakers Mr. Richard O'Sullivan, Q.C., who spoke on the problem of reconciling the Roman and Common Law traditions in International Law, and Mr. Cyril Harvey, Q.C., who shed much light on the matter of costs, a subject ignored in the Tripos syllabus but of great importance to practising lawyers.

The term ended with a joint meeting with the University Conservative Association addressed by the Lord Chancellor, Lord Kilmuir, who spoke with great force and wisdom on the position of the individual in the modern State.

The only event so far in the Lent Term has been a debate with Edinburgh University Law Society on the motion that ignorance of the law ought to be an excuse. This took place at Edinburgh, and four representatives braved ice and fog on the Great North Road to speak for Cambridge. Anglo-Scottish relations were excellent, and the result of the debate prevented an international crisis by being a draw. The society now looks forward to visits from Lord Evershed, the Master of the Rolls, and from Judge H. C. Leon, and to welcoming Lord MacDermott and Mr. Justice Diplock to the annual dinner.

Communications concerning articles and notes should be addressed to the Editor, Professor C. J. Hamson, Trinity College, Cambridge.

Books for review should be sent to the Cambridge Law Journal, Squire Law Library, The Old Schools, Cambridge.

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